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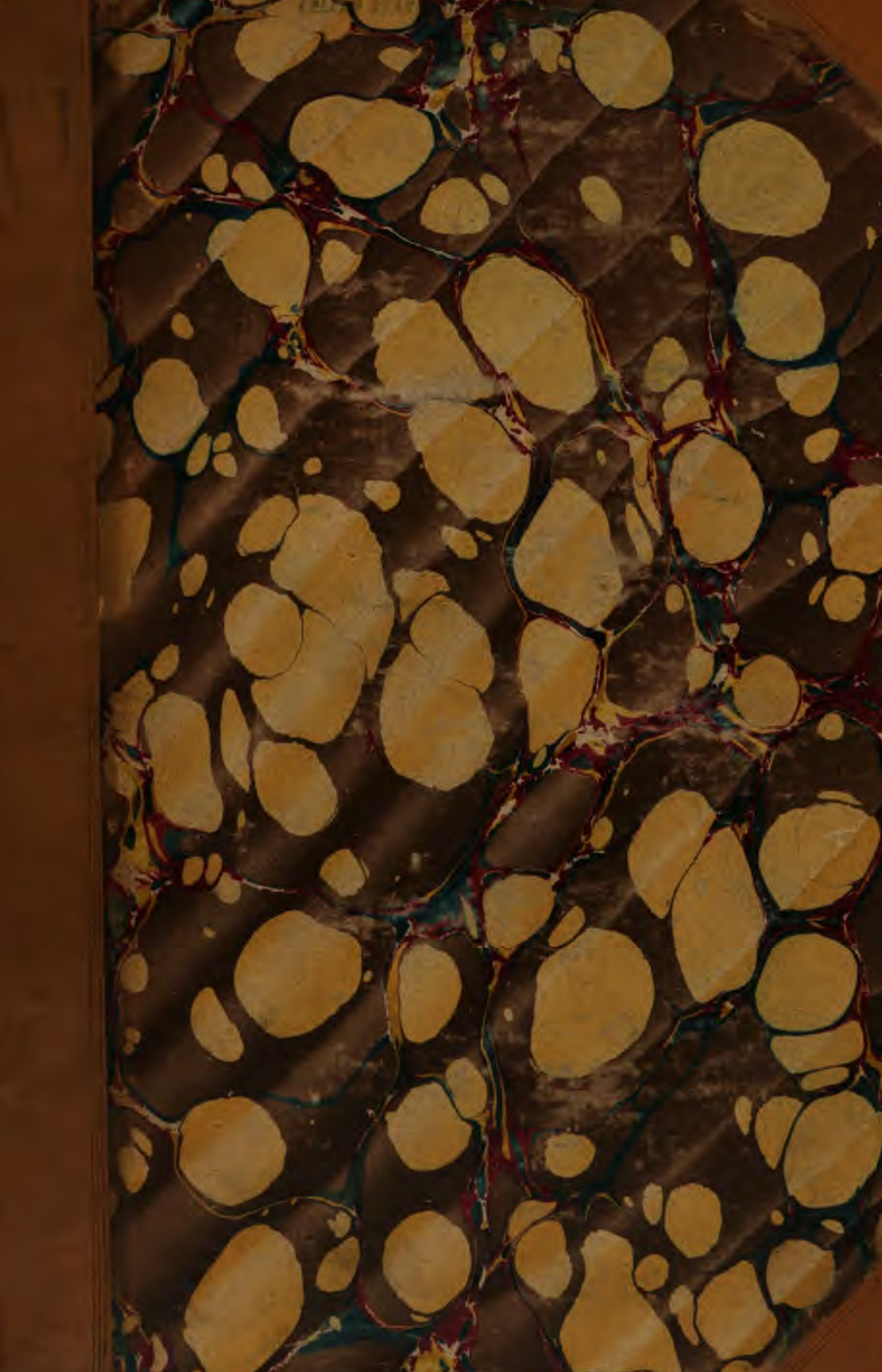
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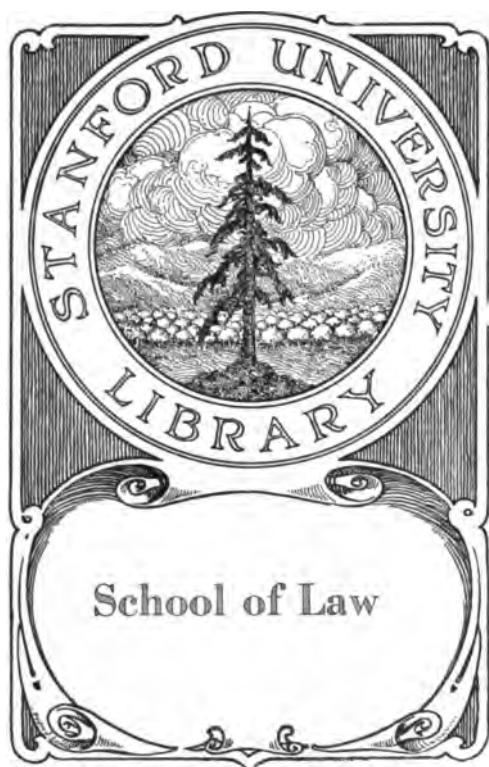
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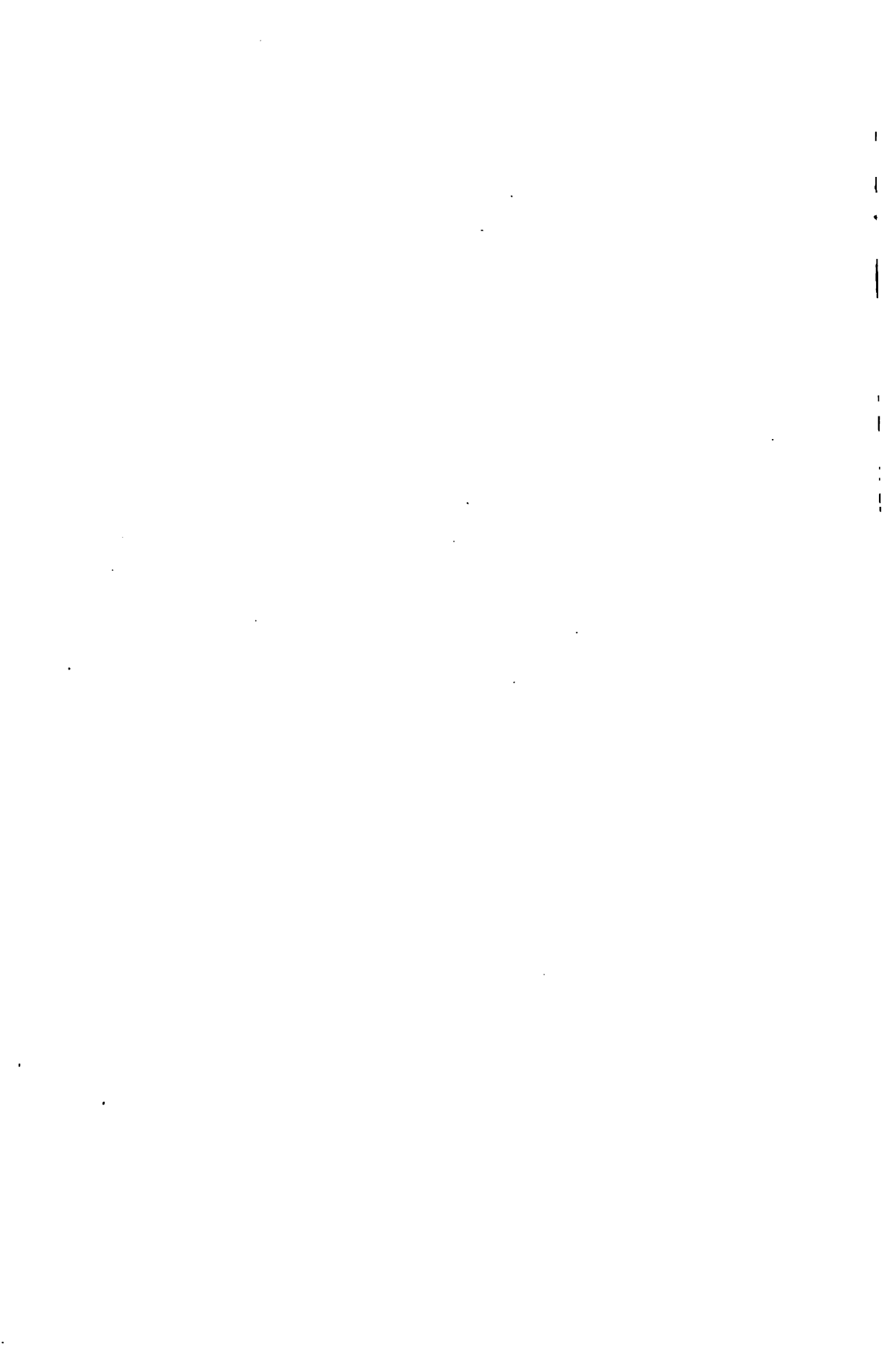
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Canada Law Journal.

VOL. XIX.

JANUARY 1, 1883.

No. 1.

DIARY FOR JANUARY.

1. Mon. . New Year's Day. County Court Term and Heir and Dev. Sitt begin. Municipal Elections held.
3. Wed. . Assizes, Hamilton, and Civil Suits, Toronto.
6. Sat. . County Court Term ends. Christmas vacation ends.
7. Sun. . *1st Sunday after Epiphany.*
9. Tue. . Court of Appeal Sittings begin. Christmas Vacation in Supreme Court ends.
11. Thur. . Sir Charles Bagot, Governor-General, 1842.
14. Sun. . *2nd Sunday after Epiphany.*

TORONTO, JAN. 1, 1883.

THE new Law Courts in London were duly opened by the Queen in person on the 4th December last. The ceremony was an interesting one, and we hope to find room for some account of the proceedings in our next number.

FOLLOWING the appointment of Mr. Wallbridge to the Chief-Justiceship of Manitoba, comes the resignation of Mr. Justice Miller. We are sorry for this, as these descents from the Bench are becoming all too common, and are far from edifying. We trust in this case it was not, as rumoured, because he had been promised the place rendered vacant by the death of the late Chief-Justice. There is now a befitting opportunity for the appointment of a puisne from the ranks of the Chancery Bar, in accordance with the wish expressed by the Winnipeg profession, and we should not be surprised if a new Master in Chancery in our own Province would be next in order. Our loss would be the gain of both lawyers and litigants in Manitoba.

A LARCENY case, recently tried at the Winnipeg Assizes, as reported in the local papers, presents some rather unusual, if not amusing features. For several months, the residents

of Portage La Prairie had been losing their cows. At first it was supposed that they might have strayed away into the prairies; but as wandering bovines not unfrequently return home another solution of the difficulty was thought desirable, and it was determined to make search for them, whether stolen or strayed, and a number of persons subscribed a sum of money to pay the necessary expenses. Amongst the subscribers to the fund was a man named Fant, who carried on, with other things, the business of a butcher. None of the missing cows were found, and the mystery became more mysterious. After some time circumstances arose which cast suspicion upon the said Fant, and a search warrant being issued, a number of hides were found in his possession, some of which bore marks which compelled the unhappy owners to believe that they had, unknown to themselves, been feasting on their own cattle, butchered by the enterprising Fant. Some time before this a horse had been stolen from the sheriff of the district, and the latter, whilst looking for his missing steed and before he had an opportunity of purchasing another one, frequently secured Fant's services to drive him into the country, either in search of the stolen animal or on other business. The sheriff, on one occasion, as he contemplated the animal in front of him, was much struck with its appearance, and remarked to Fant that it would make an excellent mate for his own lost one, should he be so fortunate as to find it, and he resolved in such case to try and make a "dicker" with Fant, and thus secure a well matched team. After the matter of the hides had been investigated, and Fant had been arrested and committed for trial a sudden inspiration seized the sheriff, and he paid a visit

EDITORIAL ITEMS—DISALLOWANCE.

with a friend to Fant's stable. They went, and after a close examination of the horse, soap and hot water were brought into requisition, and a plentiful application resulted in obliterating some neatly painted spots, and in the discovery that the sheriff had been hiring and driving behind his own long lost, long lamented bucephalus. The man Fant had in fact been supplying his customers with their own beef, which he had used a stolen horse to deliver. It was not known how many cows had been stolen, but about ten hides amongst those found (and supposed to be a small balance of the stock) were identified, and nearly as many indictments preferred against Fant. He was acquitted in the two first that were tried, and it was feared that he would escape punishment altogether from want of direct evidence of the stealing; but the jurymen, as it is supposed, began to think that if they had to try all the cases such a verdict would become monotonous, and, fortunately for his late neighbours, found him guilty on the third indictment, when the remaining ones were abandoned. He is now eating, when he can get it, penitentiary beef, but from what appears in late Winnipeg papers he has already become disgusted with his quarters, and made an unsuccessful dash for liberty.

DISALLOWANCE.

WE publish elsewhere a letter from a valued correspondent at Winnipeg, referring to some remarks on this subject which appear in a recent issue of this journal, and to which he appears to take exception, but upon what grounds we confess we cannot very clearly see from his communication.

As it is outside of the province of a legal journal to discuss any matter in its political aspect we forbear any further comment upon that part of our correspondent's letter where he suggests the substitution of the word "politician" for "lawyer." except to remark

that he seems to contradict his own affirmation immediately after having made it.

We do not quite understand what our correspondent means by asking if we hold that "the Parliament of Canada contracted with the railway, that the Governor-General's prerogative should be exercised *in a particular manner*." We should prefer before giving an answer to understand distinctly what is meant by "in a particular manner." The contention, generally, is that the Governor-General in Council has the constitutional (which we presume means also the legal) right to disallow any Act of a Local Legislature which is considered to contravene the general policy upon which the Dominion as a whole is governed. The contract with the railway is a national one, and provides, in what is known as the "twenty years clause," against the construction of certain competing lines for that period of time. The natural deduction, apart from technicalities, would be that it is the duty of the Governor-General in council to disallow any local Act incorporating a railway, the construction of which would contravene this provision of the C. P. R. contract. But further than this, the Governor in Council has the power, under the B. N. A. Act, to disallow any Act on general principles; the policy of doing so being, however, a question entirely apart from that of its constitutionality. The right of veto does not seem to be limited to Provincial Acts passed in excess of the powers conferred by the constitution.

In reference to the legislative powers of the Province of Manitoba to charter railways which "do not extend to the increased limits" or *added territory*, we do not find anything in the C. P. R. contract requiring the Governor-General in Council to veto such charters, and we must assume that he would not be advised to do so unless under circumstances of great gravity affecting the interests of the Dominion. If, however, the contention that the veto power is absolute is once admitted, then the question put by our correspondent is irrelevant to our former remarks

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which produced his letter. We need hardly say that an argument on behalf of the general principle of disallowance is that the interests of the Dominion as a whole are paramount to those of any particular province, and that where they clash, or appear to clash, it is necessary that the latter should give way to the former. Any powers given to the central authority by the Constitution, as authorized or covered by the British North America Act, were so given by the Imperial authorities with the consent of all parties interested, and were no doubt such as were considered necessary for the good government of the Dominion. How far these powers extend in certain cases, may of course be a matter for discussion and a question for some Court of competent jurisdiction, or for Imperial legislative interference.

We may remark here, in connection with the discussion of these matters, that the Dominion Government should not be looked upon as though composed of foreigners imbued with a desire to tyrannise over the provincial autonomies. The Ministers at Ottawa are our servants as much as those who rule in the provinces; they are elected by the same people, and responsible to the same public opinion to be constitutionally expressed.

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If Smith says to Brown, a medical man, "Attend upon Robinson, and if he does not pay you I will," that being a promise to answer for a debt of Robinson's, for which he is also liable, the guarantee is only a collateral undertaking, and, under the Statute of Frauds, must be in writing and signed by Smith, or some other person thereunto by him lawfully authorised, in order to be binding upon him. But if Smith says to Dr. Brown, absolutely and unqualifiedly, "Attend upon Robinson, and charge your bill to me," or "I will pay you for your attendance upon Robinson," then the whole credit being given to Smith, no written agreement is necessary

to enable the doctor to recover the amount of his account from him, since it is absolutely the debt of Smith: (Smith on Contracts, 85.)

Where a person calls at the office of a physician, and, he being absent, the visitor leaves his business card with these words written on it, "Call on Mrs. Jones, at No. 769 High Street," handing it to the clerk in attendance, with the request that he would give it to the doctor, and tell him to go as soon as possible. This caller becomes liable to pay the doctor's bill for attendance upon Mrs. Jones in pursuance of such message. Yet Mrs. Jones, if a widow, may also be liable; for one who acquiesces in the employment of a physician, and implies, by his or her conduct, that the doctor is attending at his or her request, is responsible for the value of his services. If Mrs. Jones is living with her husband, or, without her fault, away from him, the doctor has still another string to his bow, and may recover the amount of his bill from Mr. Jones; for the rule is, that a husband must pay his wife's doctors' bills. Of course the doctor cannot make all three pay: (*Bradley v. Dodge*, 45 How., N.Y., Pr. 57; *Crane v. Bandoine*, 65 Barb., N.Y., 261; *Harrison v. Grady*, 13 L. T., N. S., 369; *Spaun v. Mercer*, 8 Neb., 537.)

Long since, Park, J., was clearly of the opinion that if a mere stranger directed a surgeon to attend a poor man, such person was clearly liable to pay the surgeon: (*Watling v. Walters*, 1 C. & P. 132). Yet, in some cases in the United States, it has been held that the man who merely calls the doctor is not bound to pay him. When, for instance, in Pennsylvania, a son of full age, when living with his father, fell sick, and the father went for the doctor, urging him to visit his son. Afterwards the physician sued the parent. The Court said this was wrong, that he should have sued the son, as the father went as a messenger only, that the son, who had the benefit of the services, was the responsible person; and remarked that it was clear that had the defendant been a stranger, however

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urgent he may have been, and whatever opinions the physician may have formed as to his liability, he would not have been chargeable without an express promise to pay, as, for instance, in the case of an inn-keeper, or any other individual whose guest may receive the aid of medical service. A different principle, the Court considered, would be very pernicious, as but very few would be willing to run the risk of calling in the aid of a physician where the patient was a stranger or of doubtful ability to pay. This was in 1835: (*Boyd v. Sappington*, 6 Watts, 247.) And, in Vermont, one brother took another, who was insane, to a private lunatic asylum and asked that he (the insane one) might be taken in and cared for. This was done. In course of time the doctor sued the sane one for his bill, but the Court would not aid him in the matter, saying, "He is not liable unless he promised to pay." (*Smith v. Watson*, 14 Vt. 332.)

In the case of Mr. Dodge, above referred to, the Court said, "He might very readily have screened himself from all liability, by simply writing the memorandum on a blank card, or by adding to that which he wrote on his own card something that would have apprised the doctor of the fact that he acted in the matter for Mrs. Jones, as her agent."

The reporter did not approve of this decision, and so appended the following graphic note: "Let us see how this thing works. We will take as an illustration an almost everyday occurrence arising in the country. A. B. is taken suddenly and seriously ill in the night time, and sends to his neighbour, C. D., living in the next house to his, to have him go after the doctor as soon as he can, for he is in great pain and distress. C. D. jumps out of bed without hesitation, and hastily dresses himself, and goes out to his barn and takes a horse from the stable, and not waiting to put on a saddle or bridle, jumps on to the horse with the halter only, puts him at full speed for the doctor's office, some two or three miles distant. On arriving there he

finds the doctor absent from home, but his clerk is there, and C. D. at once says, "Tell the doctor to call on A. B., who has been taken suddenly sick; tell him to come as soon as possible." In accordance with this message the doctor calls upon A. B., and prescribes for and attends him professionally for several days. After a reasonable time the doctor sends in his bill to A. B., and it not being paid as soon as the doctor desires, he calls on C. D. and requests him to pay the bill. C. D., with perfect astonishment, asks why he is to pay. The doctor informs him that he made himself liable to pay the bill because, when he delivered the message, he did not tell the clerk that he came for the doctor by the request of A. B., nor that he acted as agent of A. B. in delivering his message. Well, says C. D., the fact was I did go at the request of A. B., and merely acted as his agent in delivering the message, and I will swear to these facts if necessary. The doctor insists that it will do him no good if he should give such testimony, for the law is settled on that point, as just such a case has recently been decided in New York under just such a state of facts, where the jury, in the Justice Court, found a verdict for the doctor for the amount of his bill; and, on appeal by the defendant to the general term of the New York Common Pleas, that Court unanimously sustained the verdict of the jury, and affirmed the judgment of the Court below. Well, says C. D., 'If that is the law I think I will wait awhile before I go after a doctor again as an act of neighbourly kindness.'" This case was decided as late as March, 1873.

A wife has implied authority to bind her husband for reasonable expense incurred in obtaining medicines and medical attendance during illness; but this implied authority is put an end to if she commits adultery while living apart from her husband, and there has been no subsequent condonation; or, if she leaves her husband's home of her own accord, and without sufficient reason, and the fact

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has become notorious, or the husband has given sufficient notice that he will no longer be responsible for any debts that she may incur: (*Harrison v. Grady*, 13 L. T., N. S. 369; *Cooper v. Lloyd*, 6 C. B., N. S. 519; *Roper on Husband and Wife*, 2nd ed. v.ii. p. 114). If a husband turn an innocent wife out of doors without the means of obtaining necessities, it is a presumption of law which cannot be rebutted by evidence, that she was turned out with the authority of her husband to pledge his credit for necessities, and in such a case medical attendance will be considered as one of the most primary necessities: (*Harrison v. Grady*, supra; *Thorpe v. Shapleigh*, 67 Me. 235.) A married woman's misconduct does not exonerate the husband from paying a doctor whom he requests to attend her: (*Webber v. Spaunpake*, 2 Redf., N. Y., 258.)

Although the law requires the husband to furnish the wife with all necessities suitable to his condition in life, including medical attendance in case of sickness, still it gives him the right to procure these necessities himself and to decide from whom and from what place they are to come. If a physician attends a wife whom he knows to be living separate and apart from her husband, he ought to enquire whether she has good cause for so doing; for if she has not he cannot make the husband pay the bill; and it has been held that it devolves upon the doctor to show that there was sufficient cause for the wife's separation: (*Berier v. Galloway*, 71 Ill. 517; *Hartmann v. Tegart*, 12 Kan. 177.) The employment of a physician by a husband to attend his sick wife presumably continues throughout the illness; and the mere fact that the wife is removed, with the husband's consent, from his home to her father's, will not enable him to resist payment of the doctor's bill for visits paid to her at the father's: (*Potter v. Virgil*, 67 Barb. N. Y., 578.)

Notwithstanding the law's desire not to favor any particular school—a quack's bill was thrown out in a case where the services were

rendered without the husband's assent. This was done in a case where a doctor was in the habit of putting a woman into a mesmeric sleep, who thereupon became a clairvoyant, and prescribed the medicines which the doctor furnished, and for these he sued. The judge said:—"The law does not recognize the dreams, visions or revelations of a woman in mesmeric sleep as necessities for a wife for which the husband, without his consent, can be made to pay. These are fancy articles which those who have money of their own to dispose of may purchase if they think proper, but they are not necessities known to the law for which the wife can pledge the credit of the absent husband:" (*Wood v. O'Kelley*, 8 Cush. 406.)

In England it is considered that a parents' duty to furnish necessities for an infant child is a moral and not a legal one. so that he is not liable to pay for medicines or medical aid furnished to his child without some proof of a contract on his part either expressed or implied. The rule of law varies in the different States of the Union. In most of them in which the question has come before the Courts the legal liability of the parent for necessities furnished to the infant is asserted, unless they are otherwise supplied by the father; and it is put upon the ground that the moral obligation is a legal one, and some of the Courts have declared this quite strongly. In other States the English rule has been held to be law, and agency and authority has been declared to be the only ground of such liability. The authority of the infant to bind the parent for medical aid supplied him will be inferred from very slight evidence: (*Parsons on Contracts*, vol. I. p. 302-303; *Blackburn v. Mackey*, 1 C. & P. 1.) But a contract to pay will not be implied when the infant has been allowed a sufficiently reasonable sum for his expenses: (*Crantz v. Gill*, 2 Esp. 471). Where the services have been rendered with the parent's knowledge and consent, he will generally have to pay for them. A boy left home against his father's

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will, and refused to return at his parent's command. Being seized with a mortal illness he did at last come back. His father went with him to a physician to obtain medical advice, and the doctor afterwards visited him professionally at his father's house. No express promise to pay was proved, nor had the father said he would not pay. The Court held the father liable to pay the doctor's bill: (*Rogers v. Turner*, 59 Mo. 116; *Deane v. Annis*, 14 Me. 26; *Swain v. Tyler*, 26 Vt. 1.) And in an English case where a father had several of his children living at a distance from his own house, under the protection of servants, it was held that if an accident happened to one of the children he was liable to pay for the medical attendance on such child, although he might not know the surgeon called in, and although the accident might have been received through the carelessness of a servant: (*Cooper v. Phillips*, 4 C. & P. 581.)

Medicines and medical aid are necessities for which an infant may legally contract, and for which he can render himself liable. In Massachusetts it was held that he would not be liable merely because his father was poor and unable to pay: (*Blackburn v. Mackey*, 1 C. & P. 1; *Hoyt v. Casey*, 14 Mass. 397.)

A master is not bound to provide medical assistance for his servant, but the obligation, if it exists at all, must arise from contract; nor will such a contract be implied simply because the servant is living under the master's roof, nor because the illness of the servant has arisen from an accident met with in the masters service: (*Wennall v. Adney*, 3 B. & P. 24; *Sellen v. Norman*, 4 C. & P. 80.) But where a servant left in charge of her master's children was made ill by suckling one of the children, and called in a medical man to attend her, with the knowledge and without the disapprobation of her mistress, it was decided that the doctor could make the father and master pay: (*Cooper v. Phillips*, 4 C. & P. 581.) And a master is bound to provide an apprentice with proper medicines and medical attendance: (*R. v. Smith*, 8 C. & P. 153.)

In England when a pauper meets with an accident, the parish where it occurs is usually liable for the surgeon's bill. If, however, the illness of the pauper arises from any other cause than accident or sudden calamity, the parish in which he is settled is under legal liability to supply him with medical aid, although he may be residing in another parish. But all these questions with regard to paupers are determined according to the poor laws of the different countries. (Glenn's Law of Medical Men, pp. 197-199.)

It has frequently happened that when a railway passenger or employee has been injured by a collision or accident, and some railway official has called in a doctor, the company has afterwards refused to pay the bill; and the courts have declined to make them do so, unless it be shown that the agent or servant who summoned the medical man had authority to do so. It has been held that neither a guard, nor the superintendent of a station, nor the engineer of the train in which the accident happened, had any implied authority as incidental to their positions to render their companies liable for medical services so rendered: (*Cox v. Midland Counties Railway*, 3 Ex. 268; *Cooper v. N. Y. C.* 13 N. Y. Sup. Ct. 276.) The Court of Exchequer said, "It is not to be supposed that the result of their decision will be prejudicial to railway travellers who may happen to be injured. It will rarely occur that the surgeon will not have a remedy against his patient, who, if he be rich, must at all events pay; and if poor, the sufferer will be entitled to a compensation from the company, if they by their servants have been guilty of a breach of duty, out of which he will be able to pay, for the surgeon's bill is always allowed for in damages. There will, therefore be little mischief to the interests of the passengers, little to the benevolent surgeons who give their services." But in England it has been decided that the general manager of a railway company has, as incidental to his employment, authority to bind his company

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for medical services bestowed upon one injured on his railway. In Illinois a similar decision was given as to a general superintendent, although in New York judgment was given the other way: (*Walker v. Great Western Railway*, 2 L. R. Ex. 228; *Cairo, &c., Railroad Company v. Mahoney*, 82 Ill. 73; *Stephenson v. N. Y. & H. R. R. Co.* 2 Duer. 341.)

If an accident happen to a stage coach by which a passenger's leg is broken, or his human form divine is otherwise injured, the coachman has no authority to bind his master by a contract with a surgeon to attend to the injury; nor if a lamp-lighter, by neglect, burn any person, has he, or any officers of the gas company, power to bind the company by a contract for the cure of the injured person: (Per Parke, B., and Rolfe, B., in *Cox v. Mid. Co. Railway*, *supra*.) If ordinary employees had such authority, then every servant who by his negligence or misconduct had caused injury to an individual, would have an implied authority to employ, on behalf and at the expense of his employer, any person he thought fit to remedy the mischief.

SELECTIONS.

PROCESSIONS IN THE STREETS.

The case of *Beatty v. Gillbanks* deals with the interesting and important questions of law raised by the mode of proceeding adopted by the religious revivalists, styling themselves the "Salvation Army." As is well known, opinions have widely differed on this subject. Last October the Home Secretary was called upon to give his advice in the matter by the magistrates of Stamford. He suggested that if riotous proceeding were apprehended, an information should be sworn to that effect; notices should be issued forbidding the procession; and, in the last resort, the procession should forcibly be prevented from forming. The soundness of this advice in point of law is negatived in *Beatty v. Gillbanks*, by the judgment of Mr. Justice Field and Mr. Justice Cave. Their judgment amounts to a

decision that a procession in the streets is a lawful proceeding, and that those who take part in it cannot be bound over to keep the peace, notwithstanding that the procession may reasonably be expected to raise a tumult. In form the case only decides that a person charged with creating an unlawful assembly cannot be bound over to keep the peace because he is taking part in a procession which is, without his so intending it, likely to lead to a breach of the peace; but, in effect, the judges decide the larger proposition, that by no form of proceeding can this kind of procession be prevented. This is clear from the fact that *Beatty v. Gillbanks* has, since its decision, been considered conclusive in the case of a member of a similar procession convicted of assaulting a police constable who had proceeded to lay hands upon him to stop the procession. The conviction was quashed, with costs against the justices, as in the case of *Beatty v. Gillbanks*. There is grave doubt whether there is power to give costs against the justices upon a case stated; and some surprise has been caused by the Court taking this course when the justices acted under the suggestion of the Home Secretary, and when the point involved does not appear to be so clear as the judges seem to consider it.

The decision of the Court on the question upon which they considered the whole matter to turn—viz., whether those who took part in the procession were guilty of an unlawful assembly—may be accepted more easily than its application to all the questions involved. Even on this point, however, the admission of Mr. Justice Field suggests that there is much to be said. The learned judge concedes that "every one must be taken to intend the natural consequences of his acts; and, therefore, if this disturbance of the peace was the necessary consequence of the acts of the appellants, they would be liable and the justices would have been right in binding them over." But what does "natural consequence" mean? It does not refer merely to physical necessity. If a man carrying a red umbrella walks into a field where there is a savage bull, the natural consequence is that the bull attacks him. If on the day of an election the most unpopular candidate parades the streets conspicuously wearing his colours, the natural consequence is that rotten eggs, if at hand, are thrown at him. It could not, however, be said that the candidate in question could be convicted on an indictment of creating a riot or unlawful assembly. The present decision goes fur-

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ther, and assumes that he could not be lawfully taken under shelter against his will, still less prevented from leaving his house. We do not think that this is so clear as the judges appear to consider it. No doubt English law has the highest respect for private judgment and individual rights, and generally forbids no act which is not unlawful in itself. But there are some cases in which the principle has been made subservient to the rights of the public. For instance, it is in itself a lawful act for a shopkeeper to make his shop window as attractive as he can, and yet a shopkeeper who attracts a crowd outside his window can be convicted of causing an obstruction (*Rex v. Carlile*, 6 C. & P. 637). In these cases the intention is immaterial, as decided in *Hall's* case (1 Ventris, 169), in which the exhibition of acrobats, apparently in private ground at Charing Cross, was pronounced illegal, as it drew a disorderly crowd. Some forty years ago, a confectioner in Regent Street had a pretty daughter, and crowds collected outside the shop to see her, creating so great an obstruction that the girl's father was obliged to take her out of the shop. It would seem strange to indict a man for having a pretty daughter; but if the effect of putting her in a shop in public view is to cause a block in the street, it is quite in accordance with sound principles of public duty to make those who place her there amenable to the law. Before Northumberland House gave place to the present Avenue, two men, by way of bringing a bet to the test, stood gazing at the lion which used to stand over the front of the house. The consequence was that an immense crowd collected in Trafalgar Square, and, in all possibility, an indictable offence was committed. In deference to the same principle the figures of Gog and Magog, which use to appear and strike the hours in front of a clockmaker's shop in Cheapside, have been silenced.

The class of cases, of which these are instances, are tolerably familiar. Whether or not the principle of them applies to processions in the street likely to arouse opposition, requires, we think, at least grave consideration. If an act, innocent in itself, becomes illegal because its natural consequence is to obstruct the public street, is it legal to do an act having a riot as its natural consequence? If the freedom from obstruction of the streets is an object which may be attained at the expense of forbidding an innocent act, is not the maintenance of the public peace, a *for-*

liori, such an object? It may be answered that the law never has been applied in this way; but the question remains whether the principles of the law does not necessarily include this application. There is a further question whether processions are in themselves a lawful use of the streets. If they are not, those who take part in them may lawfully be prevented from so doing. It is clear that the object of the defendant in *Beatty v. Gillbanks* was purely and simply to take part in a demonstration. It was not even a procession from one place to another. The "Army" with band of music, flags, and banners, started from their hall and returned again to the hall. The object was to beat up recruits. Whether this is a lawful use of the streets deserves discussion. It is true that the Army did not stand still in the street. If it had done so, doubtless an unlawful act would have been committed. If it walked in procession from one place of meeting to another, probably the streets would be lawfully used notwithstanding the flags and the band of music. But is it a lawful use of the streets to march through the principle thoroughfares of a town, and march back again to the same place? Do the objects with which the streets are dedicated to the public include this use? These are questions, amongst others, which appear involved in the present discussion; but which have hardly as yet received adequate treatment in the Courts. The decision, it is true, is in the healthy direction of individual liberty; but traditional principles of English law are apt sometimes to be pedantically applied, and to place the general rights of the public out of their true perspective.—*Law Journal*.

REPORTS.

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION—DIVISIONAL COURT.

BEATY V. BRYCE.

Appeal to Court of Appeal—Leave to appeal—O. J. A. ss. 33, 34.

When the amount involved in an interpleader issue was under \$500, but it was alleged that the decision of the Divisional Court desired to be appealed from, affected the right to other property amounting to \$2,000,

Held, that this was not a sufficient ground for granting leave to appeal.

(BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.)

This was an interpleader issue tried before GALT, J., who found in favour of the plaintiff, but upon motion to the Divisional Court his finding had been reversed, and the issue found in favour of the defendants. The amount involved in this issue was under \$500.

W. Cassels, with him *Allan Cassels*, for the plaintiff, now moved for leave to appeal from the decision of the Divisional Court to the Court of Appeal, on the ground that the decision affected the right to other property of the value of \$2,000.

Wardrope, for the defendant, opposed the application.

The CHANCELLOR.—We are all of opinion that there is no sufficient ground shown for granting the leave which is asked. The restriction which the Judicature Act has imposed on the right of appeal is not to be lightly removed. The decision in this matter is not conclusive as to the right to the other property which has been referred to. If any contention arise as to that, the question may then be carried to the Court of Appeal.

Motion refused with costs.

O'DONOHUE V. WHITTY.

Appeal to Court of Appeal—Construction of statute—Leave to appeal—When granted—O. J. A. ss. 33, 34.

When the construction of a statute is involved in a judgment sought to be appealed from,

Held, leave to appeal to the Court of Appeal should be granted, although the amount involved be less than \$200.

(BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.)

In this case the plaintiff had appealed from the ruling of the taxing officer, allowing certain costs upon a taxation as between solicitor and client. The ruling of the taxing officer had been reversed by Proudfoot, J., who held that the costs could not be recovered, because the solicitors had been guilty of negligence, and in dealing with the matter he had pronounced an opinion as to the proper construction of the statutory form of power of sale in short form mortgages. From this decision an appeal was had to the Divisional Court, which held there had been no negligence, and reversed the order of PROUDFOOT, J.

O'Donohue, Q. C., the plaintiff in person, now applied for leave to appeal to the Court of Appeal from the decision of the Divisional Court. He was stopped by the Court.

*Hoyle*s, for the solicitors whose costs were the subject of taxation, opposed the application. He referred to *Ko K'hine v. Snadden*, L. R. 2 P. C. 50; *Brown v. McLaughan*, L. R. 3 P. C. 458; *Johnston v. St. Andrews*, L. R. 3 App. Ca. 159; Judicature Act, ss. 33, 34.

The amount involved is less than \$200. The question of the construction of the statute R. S. O. c. 104, is of no importance. Even if notice of sale be not given upon exercising a power of sale, it is now only a question of damages. Here the real ground of the decision was that there was no negligence on the part of the solicitors, even if they were mistaken in their construction of the Act.

The CHANCELLOR.—Notwithstanding all that has been argued by Mr. Hoyle, we think this is a proper case in which to grant leave to appeal. The construction which has been placed on clause 14 of the form appended to the "Act respecting short forms of Mortgages," (R. S. O. c. 104) by the judgment sought to be appealed from is a matter of general interest, and affecting solicitors at large and other cases and other

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parties besides the parties to this litigation. Although under the recent statute, 42 Vict. (O.) c. 20, s. 4, the omission to give notice no longer invalidates a sale, but is a mere ground for claiming damages, still the construction which has been placed upon the R. S. O. c. 104, may seriously affect the question of damages. The leave asked, however, is an indulgence, and can only be granted on payment of the costs of the motion, and on the undertaking to set the cause down at the next regular sittings of the Court of Appeal.

Leave to appeal granted on payment of costs.

RUMOHR V. MARX.

Appeal to Divisional Court—Leave to appeal to Divisional Court after time elapsed—Mistake of solicitor's clerk—Rule 522—Time for setting down.

Where a defendant's solicitor had notified the plaintiff's solicitor of his intention to appeal from a judgment to the Divisional Court, and gave instructions to his clerk to set the cause down; but the clerk, by mistake, supposing that the seven days mentioned in Rule 522 were not clear days, suffered the last day to pass without setting the cause down, and on applying the following day to set the cause down found he was too late.

Held, that this was no ground for granting leave to set the cause down after the time had elapsed.

Held also, that the seven days mentioned in Rule 522 are "clear days."

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.]

G. D. Boulton, Q.C., for defendant, moved for leave to set this cause down to be heard before the Divisional Court. He read affidavits showing that the defendant's solicitor had informed the plaintiff's solicitor of his intention to appeal; and that the defendant's solicitor had, within proper time, given his clerk instructions to set the cause down to be heard before the Divisional Court, but that the latter, thinking that the seven days mentioned in Rule 522 were not clear days, had suffered the last day for setting the cause down to pass without doing so, and on applying to the Clerk of Records and Writs on the following day, that official had refused to set the cause down, on the ground that the preceding day was the last day causes could be set down. He contended that the proper construction of Rule 522 did not require the cause to be set down seven "clear days" before the com-

mencement of the Sittings. He referred to Rule 60 of the Court of Appeal, and argued that without such a Rule "at least seven days" does not necessarily mean "clear days."

The CHANCELLOR.—That Rule merely affirms what was previously the judicial construction of the words "at least," as determined in *Beard v. Gray* and other cases.

Boulton.—Even if the time had elapsed the Court may, under Rule 462, extend the time.

E. D. Armour, for plaintiff.—The plaintiff has acquired a vested interest in the judgment. The mistake of the defendant's solicitor's clerk is no ground for depriving the plaintiff of this right. He referred to *Mitchell v. Forbes*, 9 Dowl. 527; *The Queen v. Justices of Shropshire*, 8 Ad. & E. 173; *Beard v. Gray*, 3 Chy. Ch. R. 104; *Hayes v. Hayes*, 18 C. L. J. 157; *Borden v. Birmingham*, 7 C. D. 24; *Re Ambrose L. T. & C. Co.* 8 C. D. 643.

The CHANCELLOR.—We are all of opinion that no sufficient ground is shown for granting the leave which is asked. We are also of opinion that the proper construction of Rule 522 is that the words "at least seven days" mean clear days. The motion is therefore refused with costs, but without prejudice to any application the defendant may be advised to make for leave to appeal to the Court of Appeal.

Motion refused with costs.

HUGHES V. HUGHES.

Appeal—Discontinuance—Costs—Appeal bond—Forfeiture—R. S. O. c. 38, s. 41.

Where an appellant gave notice of discontinuance, and the respondent thereupon, without taking out any order dismissing the appeal, proceeded and taxed his costs, and then applied for and obtained an order for the delivery out of the appeal bond for suit.

Held, that the order for the delivery out of the bond was regular.

Semble also, that no order for the payment of the respondent's costs was necessary as a condition precedent to suing on the bond.

[BOYD, C., PROUDFOOT and FERGUSON, JJ.—Dec. 7.]

Donovan, for the plaintiff and his surety in an appeal bond, appealed from the order of Ferguson, J., directing that the appeal bond be delivered out for suit. The plaintiff had given notice of discontinuance of the appeal; the defendants had thereupon, without obtaining any order for costs, procured their costs to be taxed,

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and had then applied to get the appeal bond out for suit, which application had been granted. He contended that the taxation was a nullity until an order had been obtained, and that the bond ought not to have been ordered to be given out until the costs had been regularly taxed.

C. Millar and Morson, who appeared for the defendants, were not called on.

The CHANCELLOR.—We are of opinion that the bond being for the due prosecution of the appeal, the condition of the bond was forfeited the moment the notice of discontinuance was served, and the taxation of costs was merely a question affecting the damages recoverable under it, even if any order were necessary as contended; but we are of opinion that no order was necessary, and that the statute (R. S. O. c. 88, s. 41) gives the respondents the costs.

Motion refused with costs.

IN THE MARITIME COURT OF ONTARIO.

(Reported for the LAW JOURNAL.)

IN RE CARGO EX "ERIE STEWART."

There is no maritime lien for freight.

[Kingston.—Nov. 11.—Price, Sur. J.]

The petition in this case was filed at the City of Kingston, 25th October, 1882. It set out a contract to carry 15,999 bushels of wheat from Port Dover to Kingston for a certain freight, to wit, \$571.14, to be there delivered to the Montreal Transportation Co. It alleged the carriage of the wheat, its delivery to the company, the payment of \$496.67, and that the grain was then *en route* to Montreal on the company's barge *Star*. It claimed a balance of \$74.47 due for freight, and a lien on the grain for that amount. A warrant issued, and the barge and her cargo were arrested at Dickinson's Landing.

The Montreal Transportation Co. intervened, and demurred to the petition.

Whiting, for demurrer:—There is no maritime lien for freight, but only a common law possessory lien: *Foard on Shipping*, p. 542, note 6 A; *MacLachlan*, 236, 465; *Coote's Admiralty Practice*, p. 16; *Mors-le-Blanch v. Wilson*, L. R. 8, C.P.D. 236. The common law lien is gone here because there has been an unqualified delivery

of the goods: *MacLachlan*, 236–238. The Maritime Court cannot enforce a common law lien unless it arises incidentally in a suit over which the Court has jurisdiction: *Coote*, p. 16.

Smythe, contra:—There is a maritime lien for freight: *Rules 26 and 74*; *Abbott on Shipping*, p. 237.

PRICE, Surrogate Judge:—The schooner *Erie Stewart*, under bills of lading, carried a cargo of wheat from Port Dover to Kingston, and delivered the cargo to the Montreal Transportation Co.

The cargo, at the time of filing the petition herein, was "on board the barge *Star*, *en route* for Montreal." The petitioner, the owner of the schooner *Erie Stewart*, by his petition, seeks to arrest the barge *Star* and cargo for a balance of freight due him for carrying said grain.

The Montreal Transportation Co. demur in law to the petition on the ground that the action is for freight, and there is no lien on the barge and cargo.

There is a lien for freight at common law, a possessory lien which terminates with the delivery of the goods. Is there such a lien as a Maritime lien, which enables the carrier to follow the goods, such as the petitioner seeks to to enforce here.

I can find no authority for holding that the common law right for recovery of freight has been extended by the Admiralty or Vice Admiralty Act. The common law gave to the carrier full, and what was no doubt considered sufficient, remedy. "Before recovering the goods the carrier is entitled to demand reasonable charges for their carriage, and if not paid the carrier may refuse to carry. But where the goods have been carried without freight being paid the carrier has not only his right to retain the goods in his possession until paid, but may resort to an action at law to recover:" *Brown on Carriers*, 353, etc.

"In order that a ship owner may enforce his lien on the goods it is necessary that they should be legally in his possession, unless it has been reserved by express agreement:" *Kay on Shipmasters*, p. 328, etc. If the master parts voluntarily with the possession of the goods, he loses his lien on them: *Kay* 335.

If the master delivers the goods to the consignee, or to any one who represents him, so that they have become at his risk, the lien is

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gone: *Mors-le-Blanch v. Wilson*, L.R. 8 C.P.D., 227.

No obligation to pay the freight arises in point of law from the receipt of the goods, under the bill of lading, but such receipt by the endorsee of the bill of lading is reasonable evidence, from which a jury may infer a contract to pay it, the consideration for the contract being that the captain has given up his lien on the cargo, *Muller v. Young*, (in error), 25 L.J., Q.B., 94-96.

"Whether the ship-owner and his agent, the master, in cases where they are obliged to tranship the goods into another vessel, can at same time transfer the lien, which they would have had for freight had they conveyed the goods to their destination is not decided."—Kay 326.

The reading of the cases leads to the conclusion that it never has been considered that the common law right had been extended. The Vice-Admiralty Act (Imp.) 26 Vict., c. 24, sec. 10, defines the matter in which the Courts shall have jurisdiction, but does not include the case of freight.

The petitioner referred to General Rule 26 of the Admiralty Court of Ontario. I think the purpose and effect of this rule, when read with rule 74 is quite clear. They apply to cases where the freight carried, alone or with the cargo, is liable. "The cargo may not only be arrested, *eo nomine*, but also in respect of freight which is due to the owner of the ship which has carried it. For if freight has been earned, the cargo is held to represent it so long as it remains unpaid by its consignors; and the same remark applies to what is analogous to freight, viz.: where the cargo belongs to the owner of the ship, and there will be a profit realized on its sale."—Coote's Admiralty Practice, page 29.

Demurrer allowed with costs.

DIVISION COURT—COUNTY OF LINCOLN.

REED ET AL. V. SMITH.

Promissory note—Statute of Limitations—

Action by plaintiffs, payees of two promissory notes dated 24th November, 1875, payable ten months after date, one made by the defendant and endorsed by E.; and the other made by E. and endorsed by defendant. Both notes were duly protested for non pay-

ment on the third day of grace (27th September, 1876,) and notice of dishonour marked on that day.

Held, that an action brought on 27th September, 1881, was not barred by the Statute of Limitations.

[St. Catharines, Dec. 12.—SENKLER, Co. J.]

The facts and authorities are fully set out in the judgment.

Pattison for the plaintiff.

Miller, Q. C., for the defendant.

SENKLER, Co. J.—The plaintiffs bring this action to recover the sum of \$200, part of the amount of two promissory notes, both dated 24th November, 1875, payable ten months after date to the plaintiffs or order, at the Quebec Bank, St. Catharines, with interest at six per cent.; one being for \$102.25, made by the defendant and endorsed by the plaintiffs in their individual names "without recourse," by Albert England and then by the plaintiffs again; the other being for \$121.50, made by Albert England and endorsed by the plaintiffs (in the same manner as the other), by the defendant and then by the plaintiffs again. The plaintiffs, by their statement of claim, abandon any excess above \$200.

It appears from the evidence of the plaintiff Reed that on the 24th November, 1875, the plaintiffs had a sale. Defendant bought at it, and gave the note made by himself for the goods purchased by him. England endorsed this note as surety. England also bought goods, and gave the other note for the price, which note defendant endorsed as surety. The plaintiff sold the notes to one Thompson, who held them until they were within a few days of being barred by the statute. Plaintiffs then took them up. I presume that plaintiffs wrote the endorsement of their names below the name of defendant (or England) on the notes before they gave them to Thompson, as the protests attached to the notes show that notice of dishonor was sent to them. The endorsements without recourse were, however, made after the notes were handed to plaintiffs' solicitors for suit. The protests shew that the notes were duly presented at the Quebec Bank, St. Catharines, for payment on the day they became due (27th September, 1876), and that notices of dishonor were mailed on the same day. This action was commenced on the 27th September, 1882.

The defendant's counsel objected that the plaintiffs' claim was barred by the Statute of Limitations, and that the endorsement without

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recourse made by the plaintiffs after they got the notes back from Thompson was an alteration of the notes, and was made too late. He also, in a written argument handed in since the hearing, objected that the facts proved did not bring the case within the authority of *Moffatt v. Rees*, 15 U. C. R. 527, and *Gunn v. McPherson*, 18 U. C. R. 244.

I will deal with the second and third objections first.

I do not see how the endorsement before suit can be said to alter the legal effect of the notes. It was only carrying out the original intention of the parties, and the case of *Peck et al. v. Phippon*, 9 U. C. R. 73, is an authority that such endorsement might be made even after action brought. I think the evidence shows that the defendant and England endorsed each other's notes as sureties for each other, and were taken as sureties by the plaintiffs. The plaintiffs' counsel applied, after the hearing, to be allowed to furnish additional evidence on this point, but I did not think any doubt existed upon it. This objection only applies to the note endorsed by defendant.

The question of the Statute of Limitations remains to be considered.

The notes having been presented for payment, and notices of dishonour mailed on the day they fell due, this case is brought within the authority of *Sinclair v. Robson*, 16 U. C. R. 211, and I must hold that the plaintiffs' cause of action accrued on that day after this was done, that is, some time in the afternoon of the 27th September, 1876, the result being that if that day is to be reckoned as the first day of the six years of limitation, the six years expired on the 26th September, 1882, and this suit (which was brought on the 27th) was brought too late.

In the recent case of *Edgar v. Magee*, 1 Ont. R. 287, the bill sued on had not been presented for payment on the day it fell due, and on this ground that case was distinguished by Armour, J., from *Sinclair v. Robson*. Cameron, J., held that the six years commenced on the last day of grace, and that the action was brought too late. Hagarty, C. J., held that whether the cause of action accrued on the last day of grace or not, the statute did not begin to run until the following day. He says, "It seems to me that the day on which an event happens giving a cause of

action is not to be reckoned; in other words, that the 2nd December was the first day to be reckoned in the six years of limitation." The bill in that case matured on the 1st December.

The learned Chief Justice refers to several judgments of Parke, B., in support of the view taken by him. Mr. Justice Armour says in his judgment in the same case of *Edgar v. Magee*, that he is not to be understood as holding that even if the holder of a bill or note is enabled by law to put himself in a position to sue on the last day of grace, and does not put himself in that position, the Statute of Limitations will begin to run on that day; and he refers to *Blackman v. Neaving*, 43 Conn. 56, when it was held that the statute did not begin to run until the following day. In Angell on Limitations (6 Edn.) chap. 6, the question whether the day on which a cause of action accrues is to be included or excluded in the computation of the period of limitation, is considered at length, and a number of the older decisions, in which the first day was included, are referred to. Extracts are given from the judgment in *Lester v. Garland*, 15 Vesey, 248, in which case the Master of the Rolls, although not laying down any general rule, says: "Upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded rather than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of individual point, so that any act done in the compass of it is no more referable to any one than to any other portion of it, and therefore the act cannot properly be said to be passed until the day is passed." In this case the Master of the Rolls excluded the first day, but he seems to have distinguished the earlier cases which he reviews rather than to have over-ruled them, and to have observed that the act done from which the computation is made *inclusive of the day is an act to which the party against whom the time runs is privy*; and it is remarked in Mr. Angell's book, that as he unquestionably has the benefit of some portion of the day there is less hardship in constructively reckoning the whole of it as a part of the time to be allowed him.

In the cases of *Pellew v. Hundred of Wonford*, 9 B. & C. 134, and *Harly v. Ryles*, 1b. 603, the day was excluded, and in both cases the sugges-

tion last referred to was mentioned and partly made the ground of decision.

If this principle be sound law and is to be adopted in the present case, the plaintiff cannot succeed, as the protesting of the note (which is the act giving the cause of action on the third day of grace) was clearly an act to which they were privy.

I cannot find, however, any more recent cases in which this distinction has been followed or approved of; it is alluded to by Parke, B., in *Young v. Higgon*, 6 M. & W. 49 (one of the cases cited by the Chief Justice in *Edgar v. Magee*), but without approbation, and he points out that although in *Hardy v. Ryles* one of the reasons given by Bayley, J., for the judgment of the Court was that the act creating the cause of action was one to which the plaintiffs could not be considered privy, it would be difficult to support the judgment on that ground, as a man must surely be privy to the act of his own imprisonment, and that the case rests more legitimately on the general ground that the first day is to be excluded from the computation.

Young v. Higgon decided that neither the day on which a notice of action against a magistrate is served nor the day of issuing the writ is to be computed as part of the month, overruling the case of *Castle v. Burdett*, 3 T. R. 623, and ignoring the distinction in *Lester v. Garland*, where a notice of action is spoken of as a matter to which the defendant must be considered privy, as he necessarily knows the time at which he is served with the notice, and may immediately begin to consider the propriety of preventing the action by tendering amends.

In *Isaacs v. Royal Ins. Co.* L. R. 5 Ex. at p. 300, Kelly, C. B., refers to several cases on the computation of time, and says: "All these authorities illustrate the principle that in general the day on which the engagement is entered into is excluded, and the last day of the time is included." The case itself is not in point.

The rule adopted in *Young v. Higgon* and the other judgments of Parke, B., mentioned in *Edgar v. Magee*, having been approved and followed in the latter case by the Chief Justice, I consider I am bound by it and must apply it to the present case.

I think it is a fairer and more equitable way to hold that the third day of grace is excluded than included. No doubt fractions of a day

are but seldom regarded in our law, still it is clear that the holder of a note or bill has but little benefit from his cause of action accruing on the last day of grace. It does not accrue until late in the day, too late for him to procure the issue of a writ within office hours, and to treat this as the first day of the period of limitation is practically to deprive him of one day.

The argument that this construction gives him seven 27th Septembers in which to sue is technically rather than practically true.

I give judgment for the plaintiffs for \$200 and costs, to be paid in fifteen days.

I am glad that it is in the defendant's power to appeal, and thus have the point authoritatively settled; although the exact question in dispute is one not likely to arise often, the principle involved in it is of frequent application.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

IN BANCO, DECEMBER 9, 1882.

REGINA V. O'ROURKE.

Criminal law Selection of jurors—32-33 Vict. ch. 29, sec. 44 (D.)—Writ of error—Challenge to the array.

By 32-33 Vict. ch. 29, sec. 44 (D.) every person qualified and summoned to serve as a juror in criminal cases according to the law in any Province, is declared to be qualified to serve in such Province, whether such laws were passed before the B. N. A. Act or after it, subject to and in so far as such laws are not inconsistent with any Act of the Parliament of Canada.

By 42 Vict. ch. 14 (O.) and 44 Vict. ch. 6 (O.) the mode of selecting jurors in all cases, formerly regulated by 26 Vict. ch. 44, was changed.

The jury was selected according to the Ontario Act, and the prisoner challenged the array, to which the Crown demurred, and judgment was given for the Crown. The prisoner was found guilty and sentenced, and he then brought error.

Held, per HAGARTY, C. J., that the Dominion Statute was not *ultra vires* by reason of its adopting and applying the laws of Ontario as to jurors to criminal procedure.

Semble, that under sec. 139, C. S. U. C. ch. 31, where no unindifference or fraudulent dealing of the sheriff is shewn, any irregularities are not assignable for error.

Per ARMOUR and CAMERON, JJ.—The objection raised by the prisoner was not a good ground of challenge to the array.

Quære, whether when such a question has been reserved by a Judge at the trial, it can afterwards be made the subject of a writ of error.

Irving, Q.C., for the Crown.

Murphy, contra.

REGINA V. BISSELL.

Neglect to support wife—Conviction—Evidence of wife.

The wife is an inadmissible witness on the prosecution of the husband for neglect to support her.

REGINA V. NELSON.

Witness absent from Canada—Deposition—Admissibility.

The admissibility of the deposition of an absent witness, on a charge of forgery, was held to be in the discretion of the judge at the trial.

Oster, Q.C., for prisoner.

Scott, Q.C., contra.

OMNIUM SECURITIES CO. V. CAN. F. & M. INS. CO.

Fire insurance—Mortgagor and mortgagee—Subrogation—Mortgagor's fraud in getting policy.

A mortgagor of realty to plaintiffs afterwards insured the buildings with defendants, loss, if any, payable to plaintiffs. On a printed paper annexed to policy was contained an agreement that the insurance, as to mortgagee's interest only, should not be voided by any act or neglect of mortgagor or owner of property in-

sured, nor by occupation of the premises for purposes more hazardous than permitted by policy. On a loss occurring defendants resisted payment, and on a reference to arbitration an award was made in plaintiff's favour, the arbitration rejecting evidence in defendant's behalf of the fraudulent procurement of the policy.

Held, that the above agreement related only to future acts, that there was no guaranty of the policy as indisputable, and that defendants were not prevented from showing fraud in obtaining policy. The case was therefore remitted to admit the rejected evidence.

REGINA V. REEVES.

Cab driver—License.

Cap. 174, sec. 415, R. S. O., does not authorize a license fee being imposed on cab drivers, nor does 42 Vict. ch. 31, sect. 21, extend the power of the Board of Police Commissioners over persons not within its jurisdiction, so as to legalize such a fee.

Osler, J.]

GILES V. MORROW.

Dower—Absence of husband—Presumption of death.

The presumption of death, from the absence of defendant's husband for more than seven years, sufficient to support action of dower.

Cameron, J.]

[Dec. 12, 1882.

RE INGERSOLL V. CARROLL.

By-law to take gravel for street repairs—Award.

A by-law should define the granting of gravel required to be taken from a party's land for road repairing, and an award made in pursuance thereof should fix value of the granting required as well as amount payable for right of entry to take the gravel.

Read, for applicant.

Wells, contra.

COMMON PLEAS DIVISION.

THE CITIZENS INSURANCE CO. V. PARSONS
ET AL.

*Money paid into Court as security on appeal—
Dismissal of appeal by Court of Appeal and
Supreme Court—Payment out of money on
judge's order—Allowance of appeal by Privy
Council.*

On appeal to the Court of Appeal from the judgment of the Court of Queen's Bench in favour of one P. against the Citizens Insurance Company, the company paid into Court a sum of money as security for the amount of this judgment as well as for interest and costs, and also for the costs of the appeal. The appeal was dismissed with costs, and the company then appealed to the Supreme Court, and paid a further sum into Court as security for the costs of such appeal. The Supreme Court dismissed the appeal with costs. A judge's order was then obtained, under which the moneys were paid out of Court to G. and M., to whom P. had assigned them. The Company afterwards appealed to the Privy Council, when the judgment appeal was allowed and the judgment of the Supreme Court reversed. On an action brought therefor,

Held, by HAGARTY, C.J., that the company were entitled to recover back the moneys so paid out of Court on the judge's order for principal and interest, with interest thereon from that payment at six per cent.; and also all sums paid for costs, but without interest.

J. F. Smith, for the plaintiff.

McCarthy, Q.C., for the defendants G. and W.

J. Reeve, for the defendant P.

RE HALL.

Court of Appeal—Court equally divided—Judgment of res judicata—Habeas Corpus improvidently issued.

On an appeal to the Court of Appeal from the judgment of the Chancery Division, refusing a motion for the discharge of one W. H., detained in custody for the purposes of extradition to the United States under the warrant of the County Judge, and brought up under a writ of *Habeas Corpus*, and remanding him to such custody, the Court of Appeal were equally divided, but by the

certificate of this Court it appeared that it was ordered and adjudged that the appeal should be dismissed, and the judgment of the said Chancery Division affirmed. A writ of *Habeas Corpus* having been subsequently issued, under which the said W. H. was brought before the Common Pleas Division and his discharge moved for,

Held, that the order of the Court of Appeal was a judgment of that Court, so that the matter was *res judicata*, and that the writ was therefore improvidently issued and must be quashed.

Murphy, for the applicant.

Fenton, contra.

SPEARS V. MILLER.

Estate for life—"Demise and let."

Held, by ARMOUR, J., that the word "demise" is an effective word to convey an estate of freehold, and is of like import and equivalent to the word "grant" in the conveyance of an estate in fee.

An estate for life was therefore held to be validly created by the words "demise and let."

ANDERSON V. WOOLERS ET AL.

*Church Temporalities Act—Free church—
Churchwardens liability as corporation.*

Held, by CAMERON, J., that under sects. 3 and 5 of the Church Temporalities Act, 3 Vict. ch. 74, a vestry capable of electing churchwardens forming or constituting a corporation under the Act, so as to vest in them the right as such of suing or being sued, must be composed of persons holding pews in the church by purchase or lease, or of persons holding sittings therein by lease from the churchwardens; and is therefore inapplicable to a church where the sittings are wholly free.

An action, therefore, against the successors of the former churchwardens of such free church, on a contract made by them, was held not to be maintainable.

Delamere for the plaintiff.

Worrell, for the defendant.

CHANCERY DIVISION.

Boyd, C.]

[Nov. 22.]

NORTHWOOD V. TOWNSHIP OF RALEIGH.

Drainage—Negligence—Municipality—Damages—36 Vict. c. 48, s. 373.

A municipality, in the prosecution of a scheme of drainage, widened and deepened a drain, whereby the waters brought down thereby into a natural stream flowing through the plaintiff's land, were in excess of the capacity of such stream, and in consequence, at seasons, the plaintiff's land was flooded.

Held, that the municipality was bound to provide a proper outlet for the increased volume of water brought down by the drain so enlarged.

Held also, that the flooding so caused amounted in effect to an expropriation of the land flooded, and it appearing that the benefit the plaintiff derived from the drainage system, as a whole, was in excess of the injury caused by the flooding, by an equitable application of the rule laid down by 36 Vict. c. 48, s. 373, (O.) the municipality was not liable for the damage caused by the flooding.

W. Douglas, for plaintiff.

MacLennan, Q.C., and *Pegley*, for defendants.

Boyd, C.]

[Dec. 23.]

CLARKSON V. WHITE.

Insolvency—43 Vict. c. 1 (D.)—Personal earnings of insolvent pending insolvency and before discharge—Assignee in insolvency—Costs.

An assignee in insolvency is entitled to all the earnings of an insolvent which are earned after the attachment or assignment in insolvency, and before his discharge, which are not necessary for the reasonable maintenance of the insolvent and his family.

Where an insolvent applied part of his earnings in the purchase of land for the benefit of his wife,

Held, that to the extent of earnings so applied the assignee was entitled to a lien on the land.

Held also, that the repeal of the Insolvent Act before claim made by the assignee to such lien, was no bar to the claim.

Where the original plaintiffs in an action were not entitled to any relief but by amendment, a party was added to whom relief was granted.

Held, the defendants were entitled to the costs of the action up to the close of the amendment.

Moss, Q.C., and *Gibbons*, for plaintiffs.

MacKelcan, Q.C., for defendant White.

Kingsford, for defendants, the Freehold Building Society.

Boyd, C.]

[Dec. 23.]

PARK V. ST. GEORGE.

Chattel mortgage—Consideration—Assignment for benefit of creditors—Creditor—R. S. O. c. 119, ss. 1, 2, 6.

Q. and A. being indebted to the defendant for \$1,600, executed a chattel mortgage covering all their stock in trade as a security for \$2,400, there being a contemporaneous verbal agreement that the defendant would make further advances to the mortgagors to the extent of \$800.

The mortgagors having subsequently made an assignment for the benefit of creditors, the assignee, on 3rd March, 1882, took possession of the mortgaged property. On 11th March, 1882, the defendant seized the property in the hands of the assignee, under his mortgage, and by arrangement between him and some of the creditors of the mortgagor, the goods were sold and the proceeds were held by the defendant's solicitor to abide the result of litigation as to the validity of the mortgage.

The plaintiff, a simple contract creditor of Q. and A., whose debt existed at the date of the mortgage, claimed to have the mortgage declared void, and to have the proceeds paid to the assignee.

Held, the mortgage was void for not stating on its face the true consideration *Robinson v. Patterson*, 18 U. C. R. 55 followed.

Held also, that neither the making of the assignment for the benefit of creditors, nor the sale of the goods under the arrangement to hold the proceeds, intercepted the right of the plaintiff to impeach the mortgage, and that he was entitled to the relief claimed.

W. Cassels, for plaintiff.

J. Bethune, Q.C., for defendant.

Boyd, C.]

[Dec. 23.]

BARKER V. WESTOVER.

Married woman—Tort—Judgment—R. S. O. c. 125, ss. 6, 20.

The plaintiff obtained a judgment directing an account to be taken of rents and profits of plaintiff's lands wrongfully received by a married woman and her husband. The Master reported a sum of \$205 to have been received by them.

Held, that the claim being founded on a tort of the married woman, the plaintiff was entitled to judgment against her personally for the amount found due, without reference to her separate estate.

Held also, that the married woman could not be presumed to have acted under the compulsion of her husband, that if such were in fact the case it should have been set up as a defence.

Held also, that in an action against a married woman founded on tort, it is unnecessary to allege that she has separate estate.

J. Bain, for petitioner.

Langton, for respondent.

PRACTICE CASES.

Mr. Dalton, Q.C.]

[Nov.]

HENDRIE V. NEELON.

Examination before trial—Witness.

An order for the examination of a witness before trial will not be made under rule 285, O. J. A., on the ground of discovery alone; some other *special* ground must be shown.

Eddis, for the application, cited *Turner v. Kyle*, 18 C. L. J. 402.

Order refused.

Mr. Dalton, Q.C.]

[Nov. 7.]

LLOYD V. WALLACE.

Garnishment—Equitable debt.

The plaintiff recovered a judgment in ejectment against the defendant on 20th November, 1880, and taxed her costs at \$107.04.

Writs of *fi. fa.* issued and remained in the sheriff's hands unsatisfied.

The defendant's father, by his will, vested certain property in sureties, and directed them "to pay my son, Archibald Wallace, (the defendant)

the interest of the sum of \$800, annually, during the term of his natural life." The trustees, as directed by the will, invested the \$800, and interest on the sum becoming due in January, 1883.

On 14th October, 1882, *Black*, for plaintiff, obtained a summons calling upon trustees to show cause why the moneys in their hands should not be attached to answer the plaintiff's claim.

The Master in Chambers, following *Re Cowans*, L.R. 4 Chy. D. 638, approved of in *Leaming v. Woon*, 7 O. A. R. 42, made an order directing the trustees to pay the interest, from time to time accruing due, in satisfaction of the judgment debt.

Mallory, for trustees.

Gould, for defendant.

Mr. Dalton, Q.C.]

[Dec. 13.]

LAWSON V. CANADA FARMERS' M. INS. CO.

Writs of Fi. Fa., renewal of

Writs of execution were issued on the 12th December, 1881, and forwarded, with instructions, to sheriff.

On the 9th December, 1882, the plaintiff wrote the sheriff to forward the writs for renewal, and on the 11th December telegraphed him to the like effect, and he replied that he had just mailed them. On the same day the plaintiff filed a *præcipe* requiring this renewal.

The writs were received on 12th December.

Symons, for plaintiff, moved for an order for leave to renew *nunc pro tunc*.

The MASTER IN CHAMBERS:—I do not see that this is the fault of the sheriff or other officers of the Court. It is rather, I should suppose, that the application for the return, for the purpose of renewal, was delayed a little too long. It seems a case where there is no power to make the amendment. See *Clarke v. Smith*, 2 H. & N. 753; *Nayer v. Wade*, 1 B. & S. 728; L. R. 3 Q. B. D. 7.

Mr. Dalton, Q.C.]

[Dec. 13]

BEATY V. BRYCE.

Costs—Interpleader.

The plaintiff in a suit of *Bryce v. Scarborough Hotel Co.*, brought in the Chancery Division, recovered judgment for an amount entitling him to costs on the higher scale. Proceedings were

taken by Bryce, by garnishee process, to recover from one Hughes the garnishee, a sum amounting, with costs of the motion, to \$101. Execution issued, for the above amount, against Hughes, and certain goods were seized as those of Hughes', which were claimed by the plaintiff Beaty herein. An interpleader issue was directed, in which Bryce was plaintiff and Beaty was defendant, and Beaty failed to establish his claim to the goods.

On an application under the Interpleader Act, R. S. O. cap. 54, as to costs, the Master in Chambers held that the plaintiff Bryce was entitled to costs on the higher scale, as the sheriff could not, before the equity jurisdiction of the County Court was abolished in 1868, have gone to the County Court to interplead. He considered that it was his duty to decide as to the right to costs only, and that the taxing officer, when the matter came before him, was the proper person to decide as to the scale on which such costs should be taxed.

Allan Cassels, for defendant Beaty, cited R. S. O. cap. 54; *Gibb v. Gibb*, 6 W. R. 104; Morgan & Davy, Chy. Costs; Rules 428, 445, 511, 512. *Wardrope*, contra.

[This decision has been reversed by the Chancellor on appeal—Ed. C. L. J.]

Mr. Dalton, Q.C.] [June 6.

LUCAS V. FRASER.

Service—Costs—Rule 324.

A motion for judgment under Rule 324, O. J. A. It appeared that a person of the same name as defendant had been served, by mistake, for the defendant, and that he had so informed the bailiff who served him.

Held, that it was proper that the party so served should appear on this motion, on the principle that he feared an order might be made against him, and his costs were allowed at \$800.

Aylesworth, for the motion.

Langton, contra.

Cameron, J.] [Sept. 18.

TAYLOR V. BRADFORD.

Consolidation of actions—Rule 395, O. J. A.

A motion to have this action consolidated with an action brought by the defendant, in the Chan-

cery Division, against the plaintiffs, in which they had set up, by way of counter-claim, the same cause of action substantially as was set forth in their statement of claim in this action, or to have the action stayed till the other should be determined.

CAMERON, J., *held*, that though, on the facts presented, the case was not technically one within the terms of Rule 395, O. J. A., because the plaintiffs had not brought two actions, etc., yet there was an inherent right in the Court to prevent an undue use of its process.

Order made to stay proceedings, costs reserved.

Allan Cassels, for the motion.

J. B. Clarke, contra.

Mr. Dalton, Q.C.] [Dec. 16.

IMPERIAL BANK OF CANADA V. BRITTON.

Endorsement—Judgment—Rule 80, O. J. A.

A motion for judgment under Rule 80.

The endorsement on the writ was as follows:—The plaintiff's claim, \$2,000, being the amount of the defendant's over drawn account with the plaintiff's bank on the 18th September, 1882.

Held, sufficient.

Shepley, for the motion.

Howells, (O'Donohoe, Q.C.) contra.

Boyd, C.] [Dec. 18.

RE ROBERTSON AND DAGANEAU.

Vendor and purchaser—R. S. O. cap. 109.

This was an application, under R. S. O. cap. 109, by a vendor asking the opinion of the Court on certain objections taken by the purchaser to the vendor's title to the land in question.

The purchaser filed affidavits disputing the validity of his contract to purchase.

BOYD, C., declined to follow *Re Henderson and Spencer*, 8 P. R. 402, holding that the Act (R. S. O. cap. 109) was intended to provide for a simple case where there was no dispute as to the validity of the contract, but the parties wished the opinion of the Court on a question affecting the title, and the Court ought not to decide on the validity of the title until it was decided that the contract was binding.

Small, for the vendor.

Atkinson and H. Cassels, contra.

LAW STUDENTS' DEPARTMENT—CORRESPONDENCE.

LAW STUDENTS' DEPARTMENT.

A correspondent asks—

"How can the will of a man who died in the Province of Quebec be registered in Ontario if the will was executed in French before a notary public in the Province of Quebec?"

Some of our young friends had better send us answers.

EXAMINATION PAPERS.**CERTIFICATE OF FITNESS.***Real Property and Wills.*

1. "Technical words and expressions must be taken in their *technical* sense, unless a clear intention can be collected to use them in another sense, and that other can be ascertained." A devise is made to A for life, and after his decease to the heirs of his body, share and share alike. Apply the above rule to the construction of this devise, and show what estate A takes.

2. A, who manufactures salt, owns two sets of salt works, which are worked independently of each other. He makes a will, whereby he devises "All my salt works to B." Afterwards he acquires a third set of salt works, which are in no way connected with the other two. He dies without having altered his will. Do the lastly acquired salt works pass?

CORRESPONDENCE.*Disallowance.*

To the Editor of the LAW JOURNAL.

SIR,—In your issue of 1st December, you say: "To a lawyer it seems almost impossible to see more than one side of the question." The word "politician" should have been used instead of "lawyer," inasmuch as it does seem possible that a lawyer, for I presume the writer of the article to be a member of the profession, holds the opinion that the C. P. R. contract requires the Governor-General in Council to veto railway charters, granted by the Legislative Assembly of Manitoba, when such charters do not extend to the increased limits of the province. Does he pretend that the Parliament of Canada contracted with the railway that the Governor-General's prerogative should be exercised in a particular manner? If so, let him quote the clause

of the contract upon which he bases his contention. Let him show, too, wherein Sir John A. Macdonald was in error, when, in answering the Opposition cry of monopoly, he argued that the contract did not require interference with Ontario or Manitoba legislation: "We cannot check Ontario; we cannot check Manitoba."

Yours, etc.,

JOHN S. EWART.

Winnipeg, 13th Dec., 1882.

[See editorial comments, *ante* p. 2.—EDS. L. J.]

Unprofessional Letters.

To the Editor of the LAW JOURNAL.

SIR,—Please give the following circular letter the benefit of an insertion in your journal:

"Commercial Bureau for Collections. Instituted to protect the interests of the Merchants and Business Men of the United States and Canada.

(Place and date.) Mr.——.

The claim of——for \$——still remains unpaid. If this account is not settled in five days from above date we shall enforce the rules of the Bureau, and publish your name and account in our bi-monthly reports, which are issued to the Merchants and Business Men who are members of the Bureau, which will deprive you of all credit thereafter. We give you this last opportunity to adjust this claim.

Yours truly, The Commercial Bureau. Please settle with——, Attorney for the Bureau."

You have often attacked our "invaders"—men who take away the business of our profession; here is one, however, who is taking away its reputation. This Bureau looks like a blind to frighten people. Yours, etc.,

SUBSCRIBER.

[We know nothing as to the existence of this "Bureau." It sounds, however, very alarming of course, and this "dictionary" word is skilfully adapted to scare the uninitiated. But it would, in our opinion, be much more in accordance with the traditions of the cloth if the solicitor had written an ordinary professional letter, instead of endeavouring to get the money by threats.—EDS. L. J.]

The following corrections should be made in our last volume. At p. 423, for "national justice" read "natural justice," and for "liberty to appeal," read "liberty to apply;" at p. 424, for "several testatum clauses" read "usual testatum clause."

Canada Law Journal.

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JANUARY 15, 1883.

No. 2.

DIARY FOR JANUARY.

- 15. Mon.. First meeting Municipal Council (except County Council).
- 16. Tue... Heir and Dev. sittings end.
- 17. Wed.. Toronto Assizes (criminal).
- 21. Sun... *Septuagesima Sunday.*
- 22. Mon.. First English Parliament, 1256.
- 23. Tues.. First meeting County Council. Primary Exam.
- 24. Wed.. Primary Examination.
- 25. Thur.. Sir F. B. Head, Lieut.-Governor U. C., 1836.
- 28. Sun... *Sexagesima Sunday.*
- 30. Tue.. Examination for Certificate and First Intermediate.
- 31. Wed.. Earl of Elgin Governor-General, 1847. Exam. continued.

TORONTO, JAN. 15, 1883.

THE Index and Tables of Cases, etc., for the last volume, will be issued with the next number.

THOMAS HODGINS, Q.C., has been appointed Master in Ordinary in the room of Mr. Taylor, who takes the vacant seat on the Manitoba Bench. He would be a venturesome man who would prophesy as to any one that he would be in all respects as efficient as Mr. Taylor. But we can only at present say that the appointment of Mr. Hodgins is an excellent one, and we tender him our hearty congratulations. Mr. Hodgins was called to the Bar in Trinity Term, 1860, and received his silk at the hands of Sir John Macdonald in February, 1873. Like his predecessor in office he has contributed much to the legal literature of this Province, (and frequently so in the columns of this journal), in connection with municipal, election and constitutional law, in which he took a peculiar interest.

Our prognostications as to the new judge in Manitoba have proved correct, and Mr. Thomas Wardlaw Taylor, Q.C., Master in

Ordinary, was, on the 5th inst., gazetted to the seat vacated by the resignation of Mr. Justice Miller. We are glad to know that the wishes of our brethren in Winnipeg have been thus complied with. It was very important that at least one of the judges of the Supreme Court of this new Province should be thoroughly conversant with the principles of equity jurisprudence, and familiar with the practice of the Court of Chancery. It would have been hard to find one more likely to meet these requirements than Mr. Taylor. In addition to this, he has had a long judicial experience as Master, is a man of quickness and industry, in manner most courteous, and with, of course, a character beyond reproach. Mr. Taylor's legal works are well known, consisting principally of two annotated editions of the Chancery orders, a manual on titles, and a work on Equity jurisprudence, adapted from Story. We wish him every success in his new sphere, a wish which will be echoed by the whole Bar of Ontario.

INTEREST PAYABLE BY CONTRACT.

A point of some importance was recently decided by Mr. Justice Fry in the case of *Popple v. Sylvester*, 47 L. T. N. S. 329. In that case a mortgagee had brought an action and recovered judgment on a mortgage whereby the mortgagor had covenanted to pay interest on the principal money "so long as any part of the principal money should remain due upon the security;" under this judgment he recovered principal, and interest at the rate secured, up to the date of the judgment, and from thence until pay-

INTEREST PAYABLE BY CONTRACT.

ment only at the rate of four per cent. The action before Mr. Justice Fry was then brought for the recovery of the difference in the interest between seven and four per cent. from the date of judgment until payment, and that learned judge came to the conclusion that the plaintiff was entitled to recover, and he held that the mortgage was not merged in the judgment except to the extent of the money due on it when the judgment was recovered, and that as to subsequently accruing interest there was no merger. The Court of Appeal for Ontario, in *St. John v. Rykert*, 4 App. R. 213, came to the opposite conclusion, overruling the judgment of Proudfoot, V.C., 26 Gr. 252, and held that a note made payable "with interest at the rate of 2% per month until paid," was wholly merged in a judgment recovered thereon, both as to all interest then or thereafter accruing due thereon. The Court, in that case, thought the case was governed by the decision of *In re European Central Railway Co.*, L. R. 4, Chy. D. 33. In that case the company had issued debentures in which they bound themselves to pay a certain sum with interest at six per cent.; the principal sum to be paid on a day certain, and the interest to be payable in the meantime half yearly at the several dates expressed in the interest warrants annexed, *until the repayment thereof*. And the Court held that the words "until the repayment thereof" meant "until the day fixed for the repayment thereof." Fry, J., distinguishes that case from the one before him on the ground that there was no covenant to pay interest after the day named, and that therefore it was entirely different to a case where there is an express covenant to pay interest after the day fixed for the repayment of the principal.

The views expressed in *Popple v. Sylvester* may possibly be found to qualify the case of *St. John v. Rykert*, should the point there discussed come up again on appeal. We are inclined to think sufficient weight was not given in the latter case to the fact that the increased interest was not payable merely as dam-

ages, but by virtue of an express contract between the parties. Bearing this in mind, it seems to be clear that the interest recoverable was not a mere incident of the principal, but a substantial part of the contract, that therefore the only interest which could be recovered under the contract was that due when the action was commenced, or, at all events, only that which had accrued up to the date of the judgment, provided a jury could be induced to give, by way of damages, interest at the rate contracted for from the date of the writ until verdict or judgment. But clearly no claim could have been made in that action for interest which had not then accrued. The doctrine of merger certainly appears to be unduly stretched when it is held to apply not only to claims recoverable on a contract for which the plaintiff could, and did sue, but also to claims not then accrued, and for which, in the nature of things, he could not have sued, and did not sue.

Where the interest payable on default in payment of principal money, is merely recoverable as damages, and not by virtue of the express contract of the parties, then it appears to be reasonable enough to hold that although a jury might properly award by way of damages a larger rate of interest than 6%, yet that, nevertheless, the claim on the contract in such a case is after judgment thereon merged in the judgment, because there the interest is a mere incident of the principal, and awarded merely as damages for its detention, and not by virtue of any contract.

OUR much valued cotemporaries the *American Law Review* and the *Southern Law Review* have been consolidated. The new publication will hail from St. Louis, but the name of the Boston journal will be used. The new publishers announce that the *American Law Review* will retain all the best features of the two reviews, and others which will enhance its value.

OPENING OF THE NEW LAW COURTS OF ENGLAND.

OPENING OF THE NEW LAW COURTS OF ENGLAND.

This interesting and imposing ceremony marks an era in the legal and judicial history of England second to none that has preceded it. But though the day of Westminster Hall, as a legal centre, has gone by, its traditions remain (to use the words of the Queen as she took the key of the building from the Home Secretary and handed it to the Lord Chancellor) in "the independence of the judges, supported by the integrity and ability of the other members of the profession of the law, which will prove in the future, as they have been in times past, a chief security for the rights of my Crown and the liberties of my people."

The judges assembled in the Princes' Chamber at the House of Lords, and then, in stately procession, passed through Westminster Hall, sacred with so many memories of the past history of the nation, to the carriages that waited to take them to the new Courts; the Queen, meanwhile, making her way to the same rendezvous through a crowd of loyal subjects, shouting their homage to the most worthy of the long line of rulers in whose name justice has been administered to a law abiding people.

At ten o'clock the great Hall of the Court was thrown open to those who were either entitled to or had been invited to be present. The scene is thus described by the *Times*:

"Up the centre ran an open space for the Royal procession to pass from the Strand entrance to the dais raised for them at the further end, and on each side of the hall were ranged tiers of benches set apart for the different professions and corporations represented. The gathering at first was of a curiously mixed description. The full bottomed wigs and robes of the Queen's Counsel, worn only on occasion of State or in the House of Lords, the lavish gold lace of levee dress, the scarlet and ermine of the Common Law and Equity Judges, the dark, heavily-bulioned robes of the Lords Justices of Appeal, the correct black of the Incorporated Law Society,

and the brilliant uniforms and orders of the Foreign Ambassadors, blended into one kaleidoscopic whole.

* * * * *

Inside the hall the first sign of the approach of Royalty was the appearance in front of the dais of half a dozen Beefeaters, who formed not the least picturesque or the least pleasing feature of the scene. Their Elizabethan garb was a quaint suggestion of the olden time, all the more appropriate to the occasion from the fact that the roses of York and Lancaster, intertwined as the symbol of peace in their caps, are said to have been first plucked in Temple Gardens. The sun, too, as if to herald Her Majesty's coming, darted his rays with augmented force through the southern window, and filled the great hall with a crimson glory. At twenty minutes to twelve a blare of trumpets announced the entry of the civic procession—the Common Councilmen in their mauve cloaks, the Sheriffs and Aldermen in red, accompanied by the Macebearer and Swordbearer, the latter, with his curious fur cap, looking like a Tartar chief. The procession imported more colour into the already brilliant scene. Attention was now turned to the dais, where the Judges had begun to assemble. The Lord Chancellor and the Lord Chief Justice entered together from the left, the one in the sombre but richly decorated robes which form the Chancellor's State dress, the other in the bright scarlet and ermine of the Common Law Bench. A score of other Judges followed, including Mr. Gladstone, who, as Chancellor of the Exchequer, ranks as a Judge of the Supreme Court. The Prime Minister wore the heavy State robes of his office, resembling those of a Lord Justice of Appeal. Sir R. Phillimore appeared in plain black silk, and Vice-Chancellor Bacon, the last of his rank, in a distinctive robe of blue with a profusion of gold lace. Except for the presence of the Queen and her immediate attendants, and the Royal Family, the company in the great hall was now complete. Beyond the Diplomatic Body on the left sat Ministers and members of Parliament with their ladies, and beyond them again the various undistinguishable sections of 'society.' The stage was represented by Mr. Henry Irving and Miss Ellen Terry. Immediately after assembling on the platform, the Judges proceeded, two by two, down the centre of the hall to the Strand en-

OPENING OF THE NEW LAW COURTS OF ENGLAND.

trance, where by this time the Royal party were arriving.

Here the grand procession was at once formed. So perfect was the order prevailing that no sooner had Her Majesty alighted than a second blare of trumpets announced her entry into the building. As the procession moved up the centre of the hall, to the strains of Mendelssohn's march in *Athalie*, played by an invisible band, the whole assembly rose and paid silent homage to the Sovereign, who graciously bowed to right and left in return. In the fore-front walked the builders and architects; next in order, the Attorney-General and Solicitor-General, the Judges, the Lord Chancellor, the First Commissioner of Works, and the Chancellor of the Exchequer, and then the Queen, attended right and left by the Lord Chamberlain and the Lord Steward. Her Majesty wore a walking dress of black silk trimmed with fur. Immediately behind walked the Prince of Wales, the Duke of Connaught, Prince Leopold, Prince Christian; and then the Princess Beatrice, the Princess Christian, and the Princess Mary of Teck. The Princesses were all in morning dress, the Princes in military uniform over which they wore their gowns as Benchers of the Inns of Court. The Home Secretary followed as the Minister in attendance, and the rear of the procession was brought up by members of the Royal Household. On reaching the dais, the Queen was conducted to a gilt chair of State by the Home Secretary, who placed himself at her side. The Princes and Princesses took up their position behind Her Majesty, and the Judges disposed themselves in a semi-circle on either side, the Lord Chancellor taking his place on the right. The formalities of the occasion were then proceeded with. The first of these consisted in the First Commissioner of Works offering the key of the building to Her Majesty, which he did in the following words:—

May it please your Majesty,—Your Commissioner of Works and Public Buildings has been charged with the erection of this building during the last eight years. It is now complete. It falls upon me to announce to your Majesty that it is ready to be constituted as "the certain place" in which, in accordance with the ancient laws of your kingdom, justice shall be administered in the future by your Majesty's Courts.

So saying, Mr. Shaw-Lefevre handed the key on a dark crimson velvet cushion to Sir William Harcourt, who in turn presented it to Her

Majesty. It was a large key of polished steel, bearing the monogram R. C. J. (Royal Courts of Justice), and a shield with the Royal Standard. After inspecting it a moment, Her Majesty passed the emblem of possession to Sir William Harcourt."

After this the Queen read a short address from manuscript, which was heard distinctly over the hall, and taking the key from the Home Secretary, handed it to the Lord Chancellor. He replied at some length, and after other addresses were read, and replies made, the procession reformed, and Her Majesty left the building. A deputation of the workmen then came forward and presented to her a short address, to which a gracious reply was given. The distinguished company that had gathered in the hall and rooms of the new Courts gradually melted away. Many of them making their way to the different Inns of Court, when they were entertained in the royal way that the Bar there, as well as here, know how when their minds are made up in that direction.

We make no apology for inserting at length the following article from the *Times*, which follows the graphic account of the opening ceremonies:—

"The occasion which brought to Temple Bar the Queen and chief officials of the realm was more than the simple opening of a building; it was more than the transfer of a great function of State to a more commodious home. It is the opening of a new era in the history of our English Justice, that civil institution which, of all others in the entire range of the modern world, has had the longest life in the past, whilst its splendid maturity promises it yet an almost-incalculable future. On Monday last, for the first time since the rule of the Plantagenets, or rather of the early Angevins, the country saw consolidated in living and visible unity the heterogeneous mass of judicial bodies, each of which for so many centuries has had its own divergent history, and every link of which is bound up with the history of the State.

For the first time since the Norman Kings, the Sovereign held State in the Royal Court, not only as the fountain of justice in person, but as manifest head of the judicial system, of the ex-

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ecutive force, and of the legislative authority in these islands. So that, in some sort, the ceremony had a character of its own that modern England has never witnessed before. There has been no lack of pomp and splendour on many occasions when the Legislature, the civil and military officers, the corporations and the like, have been duly represented. But the occasion of Monday, in reality and historic meaning, stands quite by itself. It is not only the beginning of a new era in the oldest of our living institutions, but it will be the embodiment in visible form of that ancient order which carries back the imagination to the very origins of this realm. It was a fine thought of the Minister in charge to convert the dedication to the public of a new building, in itself so often a barren form, into a symbolic memorial of that primitive *Curia Regis*, out of which Parliament, Council, Ministry, Cabinet, and Law Courts, all alike, have issued; but from which the Law Courts were the first to develop into clear and organic life.

Of all the institutions and offices which were duly represented in the hall, the Courts of Justice go the furthest back into the past. Our judicial system was a thing of antiquity when the House of Commons first emerged into view; it was full grown before the Great Charter; nor is it clear that the Conquest did more than recast it. The Privy Council and the Garter, the Speaker and the Lord Mayor, dukes and princes, dignities and offices which seem to the layman so ancient, are things of yesterday to the legal antiquary beside the historic offices of the law. There were Chancellors and Masters of the Rolls in the time of the Conqueror; and the Barons of the Exchequer are heard of as early as his youngest son. Seven centuries ago the predecessor of Mr. Gladstone in the Treasurership of the Exchequer tells us how, in the 23rd year of King Henry II., "he sat by the window in the watch-tower near the river Thames," and resolved to record his learning in the duties of the Exchequer and its offices. And so he describes the duties which tradition and long experience had taught him, just as Sir Erskine May records the ancient custom of Parliament, as a thing even then of almost venerable age. We recognized Mr. Gladstone on Monday, not in the new-fangled style of Premier, but in the office of Chancellor of the Exchequer: an office, indeed, that was not created till the Exche-

quer had been centuries old, but which still is anterior to the House of Commons. His episcopal predecessor, who wrote the famous Dialogue, takes us back to the whole apparatus of the Court—to the oblong table with its checkered cloth to count the money withal, and the melter, and the tallies, and the clerks, and the method of accounts (here you must have the eyes of a lynx, says he). And then he goes on to tell us of the Chancellor, and his clerks, and his office, and the Marshal, and then of the Court of Exchequer and its officers, and how men traced up the functions of the Exchequer to the English kings before the Conquest, and how 'the King in the Royal Court himself decrees right by law sitting in his own person.'

The Great Charter affected, but in no way remodelled the Courts of Justice; but, since its 17th section required the Common Pleas 'to be held in some certain place,' the causes between subject and subject were henceforth fixed at Westminster; and so began that system of disintegration in our administration of justice, which has gone on increasing for nearly seven centuries down to the re-integration of our own time, the visible result of which we have just installed. How often do we notice in those vast transformations of some persistent force in nature or society, where through long epochs the tendency to divergence is counteracted by equal efforts towards union, that the full maturity of the organism reverts to the simple unity of the original germ! That is precisely what we see to-day in the long evolution of our legal system. It began even before the conquest in the primitive single Court. Under the administrative genius of the Norman and Plantagenet Kings and the judicial instinct of our race, it gradually threw out special, local, and anomalous organs. The anomalies at length swelled into an incubus, till the recuperative energy of the system, by a series of vigorous crises, has established at last an organic unity. It is the triumph of civilization to reduce to orderly working the active powers which in ruder times were held by arbitrary bounds. The unity which, in the days of the Confessor, the Conqueror, Henry Beauclerc, and Henry of Anjou, was the simplicity of mere inexperience, is achieved in the days of Victoria, after eight centuries of strong life, by the harmony of mature science. And that judicial organism, after eight centuries, is as much

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superior to-day to its original germ in vitality and force, as it is in flexibility and learning. So that the fusion of its parts, of which Monday presented the outward and visible sign, was no heraldic pageant or mere historic survival; it was the starting point of a new development with a boundless range for its energies to come. And the era of Victoria will certainly not be the least in the annals of our law, amid that small list of epochs which have seen our administrative system recast, a list that can hardly be extended beyond the names of the Conqueror, the first and the second Henry, the first Edward, and the Restoration.

Few of those who pressed on Monday to catch a glimpse of the show or procession, will have any idea that the ceremony of the day was in some sort an act of respect to the Great Charter itself, when viewed in connexion with recent Acts. The Common Pleas, by virtue of the Judicature Act, being merged in the High Court of Justice, having perforce to quit the Hall of Rufus, that 'certain place' in which they settled as required by the Charter of John. On the day that they migrate to that other, but new 'certain place,' by the Temple and the Inns of Court, where they may look for a history as long in times to come, it is due to the conventional respect we all of us pay to the Act of Runnymede, that the 'place' should be proclaimed in the sight of the nation. But the ceremony, if connected with the future through the Judicature Acts of the present reign, goes back in its symbols and suggestions to a time much earlier than the Barons and the Charter. In those days, as now, there was a Chancellor, but no Court of Chancery: then there was an Exchequer, but no Court of Exchequer; there were then, as now, no courts of exclusive law and equity; there was one supreme court, of which all the judges had a share; there was a Chief Justice, but no special Court of King's Bench. Nay, more, the ceremony of Monday gathered in one hall the executive and legislative chiefs, beside the judicial. And so, when the Sovereign in state installed at length the united Courts of Justice in their new common seat, and there took her place surrounded by her sons and her family, by the officers of her house and the officers of State, by peers and magnates of various degree, the scene in the great gothic hall at St. Clement's curiously served to recall

one of the gatherings in the dawn of English history, when the King's Court was Parliament, Council, Cabinet, Chancery, King's Bench, Exchequer, and Common Pleas in one, and claimed to be a survival of the old English Gemot, which had power to dispose of the throne itself. It is a quaint point of resemblance to the representative character of this rather elastic body of councillors, that in the open court beyond, the First Commissioner proposes to place, beside so many Witan, or Sapientes, a stout contingent from the people.

The scene must strangely remind us of that stubborn continuity in our English law which has few parallels in history. But two institutions of man can be found to surpass it—one in the ancient world, one in the spiritual sphere—the law of Rome, and the Christian Church. And to put aside these, no modern civil institution, unless we count the throne of England, has any such continuous record. The origins of the English law and its principal offices can be traced back in unbroken series to types that are distant nearly a thousand years. And the actual organization and forms of our own memory have for some seven or eight centuries been in full activity. They were venerable things before the Constitution itself had begun its secular course of development. A man tried for treason to-day must be judged by a law made before the battle of Poitiers was fought, 530 years ago; and at this hour the greatest of all authorities in law is he who once was Attorney-General to Queen Elizabeth. No man can understand how an acre of land is transferred till he goes back to the laws of the first Edward; and the art of conveyancing arose out of innovations which, in things spiritual, are called the Reformation.

A case tried 200 years ago, but for trivial verbal differences, might easily be taken to be argued but yesterday; and as to the reports of 100 years back, there are scores of cases where every turn of expression and argument may be heard any day in term. The apparatus of the Great Seal and its bodyguard, the Hanaper Office, and the Petty Bag, and the quaint offices remembered by living men, all descended from ages when great men could not write their names. The noblest hall that remains to us from the great architecture of the Middle Ages has been the Royal Court of Justice, ever since its walls were raised. The most perfect hall of the Renais-

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sance, that exquisite work of the great days of Elizabeth, the only remaining building where a play of Shakespeare's was presented to the Queen, the Court, and his contemporaries, that matchless relic is the hall of an Inn of Court. Three hundred and ten years have mellowed the glow of its blazoned windows, and the quaint fancy of its oaken screen, the fretted beams of its roof, and the faces of the kings and sages of the law in the paintings on its walls. A man who is neither a herald nor an æsthete may permit himself a weak corner in his interests for that long roll of lawyers whose arms and portraits people the four Inns of Court. There is no collection of portraits with so high a standard of power, dignity, acuteness, and patience. And the ermine and scarlet of the judges is, perhaps, the one living bit of noble mediæval costume which has survived the storm of modern innovation.

It was no lawyer, but a poet and the friend of Shakespeare, who called the Inns of Court "the noblest nurseries of humanity and liberty in the kingdom;" and if this were poetic exaggeration of rare old Ben, it remains most true, that the part they have played in literature and politics is hardly less than their part in law. Strike out of English poetry and prose, out of drama, fiction and essay, strike out of the history of our Parliament and of our Government, all members of the Inns and the associations of the Inns, and the blank would be serious indeed. A library would hardly tell the tale of those who flourished, and of all that was done within these precincts of the law. Scores of streets and alleys occupied the site of the present Courts of Justice, and the annals of each single street, and sometimes of a single house, would almost fill a volume. In spite of jests and quarrels, the public has ever taken kindly to the law, and yet more kindly to the lawyers; from Shakespeare to Goldsmith, from Bacon down to Thackeray and Dickens, our literature is saturated with the local colouring of Gray's Inn and the Temple, and of the communities out of which have issued so many of our statesmen, philosophers, teachers and poets.

And the public instinct is true when it feels that the societies of the law and the institutions of justice, which have in the past a history so rich and great, are about to begin a new life under new and ampler conditions. Vast as the

antiquity of English law has now become, it has not yet reached the thirteen centuries of Roman law proper; and the era of Justinian, which seemed at the time to be the end of that unparalleled growth, was itself, we can see now, but the beginning of another epoch of thirteen centuries, wherein the Roman law has since, with its rival the English, completely encircled the civilized world. There is untold work yet before the English lawyer; whole mountains of obstruction and obsolete matter to level; areas of consolidation to clear, compared to which the task of Trebonian was an everyday thing. But the Roman law had lasted for near a thousand years, it had outlived even all that in government was free, and all that in philosophy and literature was brilliant, and it was still in the maturity of its career, rent by anomalies as deep as any in our law to-day, as deeply encumbered with antique forms, as much laden with the masses of its own learning, and as far as we are now from its own ideal of symmetry and elegance. And in spite of its thousand years of life, it had youth and strength enough to spare to complete its task to the end, so that, in the issue, the last years of its mighty career in the old world were the grandest of all; and the work of Justinian has impressed the imagination of mankind more than the work of all preceding legislators or jurists. Few will think that the civilized world and the rising Christianity of the early Middle Ages would ever have perfectly absorbed the Roman law, if they ever had it offered them in its primitive instead of in its final form.

The English law has had a career not wholly unlike the Roman. It has cast out its archaisms; it has built up its equity into a vast but elastic fabric; it has recast its judicial organization, its procedure, its formulas; it has at length fused its law and equity, and has abolished the conflict of its own technicalities and fictions. It at last has a judicial machinery in full harmony with the times and their practical needs. But it retains some structural anomalies of really special importance; it has little that can be called symmetry; and it almost despairs of consolidation. The English law, in fact, is nearly in the same stage of its history that the Roman law was in the epoch of its maturity, but before the great consolidation of Justinian and his immediate predecessors. It is a laughable phrase

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of the annalists when they speak of our great law-founder, Edward I., as the English Justinian. Even Victoria is not, or is not yet, the English Justinian. The work of final consolidation in our law, where the very fragments of the consolidation material already fill a library, is perhaps too vast a task for any reign, however long and however creative. That great task awaits the Trebonians and Justinians to come. It will be amply enough to place the name of Victoria beyond that of Edward, that she has given organic life to the whole judicial function.

This is, in law, the true boast of this reign ; and it was to crown and symbolize this work by her personal authority that the Queen took her place in the Courts in person. Every layman who has dipped into Blackstone remembers that the Sovereign is the head of the law, present in theory in Court as Judge, and in early times present in fact. But the King, though present in person, and of right entitled to be present, to hear, and to try, is not, by the Constitution (that is, by custom) empowered to determine any cause or motion except by the mouth of his Judges, to whom he has committed his whole judicial authority. Henry Beauclerc, a great king and a great lawyer, would hear causes himself, and he swore dreadfully, "per oculos Dei," when he came to a knotty point—for your Norman King was a soldier of terrible passions. John, Henry, and the four Edwards sat and heard causes in the King's Bench ; and Queens Consort did the same when acting as Regent. It was the troublesome learning of James Stuart which drew down on him the rebuke of the Bench when he wished to give judgment in lieu of his Judge. James, who thought he knew more philosophy than Bacon, and more theology than Hooker, was eager to prove that he knew more law than Coke. But the Judges interposed, and saved the Constitution. Like the legendary Judge who arrested the heir to the throne for contempt of Court, the Judges interrupted a King when about to infringe on their functions.

If Her Majesty had chosen on Monday to sit in court as Judge, at least so far as to hear some formal motion, it would have been in strict accordance with precedent, and the habits of some of her most illustrious ancestors. It would have given a new force and meaning to that which in these days is of rare and precious value.

The office of Judge in this realm is not only the most ancient office that any subject can hold, but it is independent of prerogative, arbitrary will, suffrage, election, Parliament, or House of Commons. It is far older than any electoral body or function known to us ; it is utterly apart from any electoral body or authority ; and it is the one great popular institution with which representation has nothing to do and nothing to say. In these days the progress of democracy is a fact ; the extension of the representative doctrine and the electoral machine is as certain as the rising sun. Unwise men only will quarrel with it or defy it. But its place is politics, not law. Schemes of extending the suffrage belong to the House of Commons. The judicial system has a wholly different origin, a perfectly separate history. Democracies around us everywhere, in America and France, have cast, or are casting, their judicial, like their political system into the ever quickening vortex of the huge electoral mill.

For our English Judges there never was—let us hope there never will be—any *bene placito* as their tenure, whether it be the *placet* of Prince, caucus, or people. The ceremony of Monday will serve to remind us all that our judicial system, at any rate, does not ultimately rest upon a ballot-box. It is a remnant of the Old English polity which should never be mixed up in our modern political strife. It is the oldest civil organization in our State, and looks on the House of Commons itself as the elder race of gods used to watch the new. A republican and a puritan, so long as he loves good order, historic permanence, and personal dignity, must have felt some stir of sympathy within him as he watched the long line of ermined Judges pace down the storied hall of the Red King for the last time after so many centuries of continuous and illustrious toil by their forerunners in office within those memorable walls. And they, on the other hand, who care for the mystery of courtiers and heralds may have found some new authority in the office of Judge, when they saw, seated on the seat of judgment as the first and head of the Judges, the Sovereign in person, herself the heir of a House that has no equal in modern times in antiquity and power ; for, through every change and growth of this Empire, it has carried down the blood of the first chief who led the West Saxons across the seas, through a hundred

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Kings famous in story, and among them nearly all who built up the massive foundations of this Commonwealth."

NOTES OF CANADIAN CASES.

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QUEEN'S BENCH DIVISION.

IN BANCO, DECEMBER 9, 1882.

MURPHY V. G. T. RAILWAY CO.

Railway—Fencing—Gates—Disrepair.

A beast of plaintiff's escaping from a field adjacent to a railway which crossed his farm, through a gate opposite a farm crossing in disrepair, and being killed, it was held that defendants were liable, as it was their duty to keep the gate in repair.

December 30, 1882.

LOTT V. DRURY.

Slander—Nonsuit.

Plaintiff was a miller, and defendant said he had run away in debt to him and others; that he had cleared out.

Held, that a nonsuit was wrong, as the words directly affected plaintiff in his business.

FORRESTER V. THRASHER.

Insolvent—Assignment without assets—Discharge.

A judgment was obtained against defendant in this suit for breach of promise of marriage, and in another for seduction. Defendant afterwards made an assignment, with no assets; no creditors appeared against him, and he then got his discharge. Subsequently acquiring property, execution was issued in this action; but

Held, that his want of assets when he got his discharge was no ground for setting aside the discharge, which, in the absence of a charge of fraud in its obtention, was an answer to plaintiff's claim.

BELL V. RIDDELL.

Felony—Stifling—Pro-note—Unlawful consideration.

Held, that the consideration for a pro-note being the stifling of a felony, avoided the note.

TURNER V. LUCAS.

Preferential judgment—R. S. O. ch. 118.

A debtor of defendant being insolvent, was sued by defendant, and by collusion with the defendant, he appeared, defended, and then allowed his defence to be struck out, when a judgment was at once got against him. Plaintiff also sued, and in regular course got judgment.

Held, defendant's judgment good.

REGINA V. DAGGETT.

Sunday Act—Travellers.

Defendant having been convicted of a violation of R. S. O. ch. 189, for carrying passengers in his vessel on Sunday from Niagara to Toronto,

Held, passengers were travellers within the exception of sec. 1 of the Act, and the conviction was quashed.

LETT V. ST. LAWRENCE, ETC., RAILWAY CO.

Lord Campbell's Act—Death of wife—Right of husband to sue for self and children.

Held, that the husband was not entitled on death of his wife caused by defendants' railway, to recover either for self or children, for aught but pecuniary loss.

WALTON V. WOODSTOCK GAS CO. ET AL.

Recovery of land—Limitation of action.

Plaintiff having on 8th April, 1854, got a grant in fee of vacant land, made no entry. Subsequently a railway company surveyed part of it, with other land, for their line, and an award was made in plaintiff's favour, but the company did not take possession, control it, pay for it, nor deposit maps or plans. One M., on 31st December, 1857, got judgment against the Company in certain Chancery proceedings, and sold the Company's interest to defendant P. P. did not

take possession. He went, however, upon the land to see if the soil was fit for bricks, but he did not enclose it, though he agreed to pay part of the expense if the next owners would fence. P. in 1875 sold to the Gas Company, who took possession and improved, the Railway Company and defendants paying taxes from 1853.

Held, (CAMERON, J., dissenting), that plaintiff could recover the land, for that the possession of neither the Railway Company nor of defendant P. was sufficient to destroy his title.

PARSONS V. THE QUEEN INSURANCE CO.

Fire Insurance—Statutory condition—Variation condition.

The plaintiff applied for an insurance upon his stock in trade with the defendant company. Pending negotiations the company's agent conversed with the plaintiff respecting the amount of gunpowder stored on the premises. He said he thought the company's condition was to allow 25 pounds to be kept. Plaintiff said he did not keep more than 10 pounds, and had not more than that in stock. The insurance was then effected by an interim receipt, and the next day a loss occurred. The plaintiff had more than 10 pounds, but less than 25 pounds of powder in stock when the fire occurred. The statutory conditions prohibited more than 25 pounds being kept in stock without permission, and the company's variation of this condition relieved them from liability, if more than 10 pounds was "deposited on the premises, unless the same be specially allowed in the body of the policy, and suitable extra premium paid." The case having been dealt with on other grounds on an appeal to the Privy Council, was remitted to this Court to try whether the variation was a just and reasonable one.

Held, [HAGARTY, J., dissenting], that under the circumstances of this case, inasmuch as the company's agent had represented that 25 pounds of gunpowder was allowed to be kept in stock, the condition now insisted upon was not a just and reasonable one, and was therefore void, and that the plaintiff should recover.

Per ARMOUR, C.J.—The Act R. S. O. cap. 162, passed for the purpose of securing uniformity of conditions upon fire policies, and setting out such conditions as it deemed proper to be inserted in every policy, showed that the legisla-

ture believed such conditions to be just and reasonable for both insurers and insured, and therefore, that if any of the statutory conditions should be varied so as to increase the burden of the insured, such variation would not be a just and reasonable one, within the meaning of the Act.

Per HAGARTY, C. J., and GALT, J.—The variation was a just and reasonable one.

Per HAGARTY, C. J.—The statutory condition exempting the company from liability, if more than 25 pounds of powder were kept without permission, does not preclude or prohibit the insurers from bargaining that they will not be liable if more than 10 pounds be kept, except on certain conditions as to extra premium, etc.

Creelman, for the plaintiff.

Bethune, Q.C., and *Small*, for defendants.

HINTON V. ST. LAWRENCE AND OTTAWA RAILWAY CO.

LETT V. THE SAME.

Railway—Negligence—Accident—Running on unauthorized track.

The defendant company had laid three tracks upon a highway of the City of Ottawa, one of which had been laid without authority from the City, but had been used for a number of years, the City acquiescing, and the plans showing its existence were produced from their custody. This track diverged from the main track at the crossing of another street, and ran nearer to the adjacent buildings, so that a person approaching by the cross street could not see an approaching train at as great a distance as if it were on the main track. The plaintiff H. and a wife of the plaintiff L. were struck by a passing train when driving across this track. The learned Judge at the trial refused to direct the jury that the third track was laid without authority, and that its existence there was a wrongful act, but told them that the Company had no right to lay the rail, and that the question was whether the accident was caused by their negligence.

Held, that there was no misdirection, but that the existence of the third track was an element in considering the danger of the crossing, as it apparently increased the risk.

McCarthy, Q.C., for the plaintiff.

Bethune, Q.C., for the defendants.

REGINA v. PHIPPS.

*Extradition—Ashburton Treaty—Forgery—
Original warrant.*

The prisoner was the superintendent of an almshouse in Philadelphia, Penn., which was supported by the City of Philadelphia. Certain persons furnished goods to the almshouse and were entitled to receive warrants from the almshouse for the price thereof. The warrants were duly prepared and signed, in favour of the parties entitled, in the hands of W., the secretary of the almshouse, to be delivered to the proper parties on their signing the counterfoils of the warrants. The prisoner obtained possession of the warrants by falsely representing to W. that he had authority to sign the names of the respective parties entitled and by signing such names on the counterfoils. The warrants were then cashed at the city treasury.

Held, [CAMERON, J., dissenting,] that the offence amounted to forgery within the meaning of the Ashburton Treaty, and that the prisoner should be remanded for extradition.

Per HAGARTY, C.J.—The evidence disclosed a *prima facie* case of forgery, sufficient to warrant the commitment for trial of the prisoner if the crime had been committed in Canada.

Per ARMOUR, J.—The treaty was not intended to include the crime of forgery, only when that crime is common to both countries. In framing the treaty the high contracting parties were dealing with the then present and future, and the general term forgery should include everything in the nature of forgery, and which thereafter might be held to be forgery at common law by the decisions of the Courts, or might be declared to be forgery by the statute law.

Held, also, that the original warrant, within the meaning of 31 Vict., c. 94, sec. 2 (D), is not the first of two or more consecutive warrants, but is any warrant issued in the United States.

MIDLAND RAILWAY CO. v. ONTARIO ROLLING
MILLS CO.

*Contract to deliver iron—Cash as delivered—
Delivery of part—Refusal of payment until
whole delivered—Repudiation of contract—
Counter claim—Damages for non-delivery of
remainder.*

The plaintiff agreed to deliver to the defendant 1,300 to 1,500 tons of old iron rails, etc.,

"cash on delivery of each 100 tons, or with privilege of drawing against them as may be agreed between us, as they are shipped." On 17th February, 1880, the plaintiff, having delivered 1,150, sent an account of shipments and drew for \$1,500, which the defendant refused to accept on 21st of February, erroneously asserting that two car loads, price \$333, had not been received, when, in fact, they had been received, as afterwards acknowledged by them, and adding, "we think you should now deliver the balance due on contract before asking us to pay any more money. The time has so far gone by the date when we expected the whole amount, that we think it not unreasonable to ask this." There was a silence for some time, and on 5th June, 1880, the plaintiffs wrote, "We shall now soon be able to complete the delivery of old rails," and then went on to refer to another contemplated contract. In answer, the defendants' agents referred to the contemplated contract, but said nothing about the completion of the present one. In August, 1880, the plaintiffs again drew for the price of the amount delivered, which was refused acceptance for the same reasons as before. The plaintiffs sued for the price of the iron delivered, and the defendants counter-claimed for damages for the non-delivery of the difference between the iron delivered and 1,300 tons.

Held, [HAGARTY, C.J., dissenting,] reversing the judgment of OSLER, J., who tried the case, that the refusal of the defendants to pay for the iron, except upon delivery of the remainder, not amounting to such a repudiation of the terms of the contract as would have then entitled the plaintiffs to sue for breach thereof in not accepting the remaining 150 tons, did not absolve the plaintiffs from the delivery of the remainder; and that while the defendants were liable for the price of the amount delivered, they were entitled to judgment on their counter-claim for damages caused by failure of the plaintiffs to deliver the balance.

Kerr, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

COMMON PLEAS DIVISION.

IN BANCO, DECEMBER 29TH, 1882.

LONDON LOAN CO. V. SMITH.

Mortgage—Absence of covenant to repay—Evidence of debt.

Held, that a mortgage which contains no covenant for repayment of the consideration money does not of itself afford evidence of a debt

Gibbon, (of London), for the plaintiff.

Meredith. Q.C., for the defendant.

MCGREGOR V. MCNEIL.

Agreement to cut timber—Chattels—Right to remove after time limited.

Under an agreement, dated 2nd October, 1880, the defendant sold to B. all the pine timber growing on certain land, to be removed during the years 1880 and 1881. The timber was all cut into logs before the end of 1881, but a portion was not then removed.

Held, that this was a sale of goods and chattels, and not of an interest in land, and the timber so cut, being the plaintiff's property, he had the right to remove it after the expiration of the time mentioned.

R. Martin, Q.C., for the plaintiff.

Lount, Q.C., for the defendant.

DOYLE V. BELL.

Dominion elections—Civil remedy—Ultra vires.

Held, that sec. 109 of the Dominion Election Act, 37 Vict. ch. 9, which gives a civil remedy for the recovery of the penalties imposed for the offences committed against sec. 92 of the Act, namely, bribery, etc., was not *ultra vires* of the Dominion Parliament.

Osler, Q.C., for the plaintiff.

Bethune. Q.C., for the defendant.

UNION INSURANCE COMPANY V. FITZSIMMONS.

UNION INSURANCE COMPANY V. SHIELDS.

Calls—Notice—Evidence of—Delivery of—Mailing—Stockholder—Company—Winding up—Right to sue.

Actions for calls. The 37 Vict., c. 93. sec. 7, under the authority of which the calls in question were made, provided that no call should be less than 10 per cent., and 30 days notice should be

given of every such call. The resolution passed for giving the call, was passed on the 3rd August, 1881, the call to be payable on Tuesday, September 6th.

In the first named case the defendant lived in Ottawa. On Friday, August 5th, notice in proper form was mailed at Toronto, properly addressed to defendant at Ottawa, which in due course of post would reach Ottawa office at 7 p.m. On Saturday evening the office closed at 7.30, and unless by personal application to the post master the letter would not be delivered until the Monday following, August 8th, when it was as a fact delivered.

Held, (WILSON, C.J., doubting,) that under the statute the delivery of the notice must be deemed to be made from the mailing, and therefore the notice was good.

In the last named case the objection was that the defendant was not a stockholder, because that the stock had become vested in his assignee in insolvency; and also that the defendant had not received notice of the call. It appeared that the stock had never been returned by the defendant to the assignee as part of his assets, that the assignee had never accepted it, and that the defendant had subsequently received a dividend on it. It also appeared that the notices were sent to the assignee, and that he directed his book-keeper to forward them to defendant, which he stated he did; while the plaintiffs' manager stated, that, after the call was made, he spoke to the defendant about it, and he promised to pay it. The defendant denied having received notice, and the conversation with the manager.

Held, on the evidence, that the defendant was still a stockholder, and that he must be deemed to have had notice.

In both the above cases it was objected that there was no power to sue, because that the company's license had, under 42 Vict., c. 25, been revoked; but it was shewn that one B. had been duly appointed receiver, and was specially required, by the order of the Chancery Division, to prosecute all members in arrears for calls, and that he had adopted these actions and was prosecuting them as receiver. The objection was therefore held not to be tenable.

Frank Hodgins, for the plaintiffs.

Biggar, for the defendant Fitzsimmons.

Falconbridge, for defendant Shields.

C. P. Div.]

NOTES OF CANADIAN CASES.

[C. P. Div.]

CHAPMAN V. SMITH.

Practice - Order dismissing action after once taken to trial—O. J. Act, Rule 255.

Issue was joined in an action, on the 16th December, 1881, and the case tried on the 22nd, when a nonsuit was entered, which by consent was set aside. The record was again entered for the March Assizes of 1881, and remained over until the following Assizes, when by consent it was struck out, without costs to either party. These proceedings were before the O. J. Act. After this Act came in force the plaintiff's solicitors, though they stated that the plaintiff did not intend to go on with the action, refused to consent to its dismissal, and an order was obtained from the Master in Chambers dismissing it with costs. On appeal to CAMERON, J., the Master's order was set aside. The defendants then appealed to the Divisional Court.

Held, that, under the O. J. Act, Rule 255, the Master's order was properly made, that the words in that rule, "for the next sittings of the Court," were not confined to the first sittings which took place after the close of the pleadings, and that the fact, therefore, of the plaintiff having taken the case once to trial did not prevent the defendant from moving for a dismissal of the action, in case the plaintiff neglected to take the case down again for trial on a future occasion.

Holman, for the plaintiff.

Watson, for the defendant.

KELSEY V. ROGERS.

Contract to make staves—Property in.

The plaintiff, residing in Detroit, on 22nd December, 1880, entered into an agreement with one M., headed "A Mem." of a joint account agreement between the parties, whereby M. agreed to furnish to the joint account, loaded in cars at stations on G. T. and G. W. Rys., 12,000 to 15,000 staves at \$180 per M., describing the kinds with the prices, to be loaded in cars and ready for shipment not later than June 1st, 1881, to be a joint account transaction, share and share alike in gain or loss, and to be consigned to a Quebec house, which would pay freight and commission. The plaintiff to furnish a competent man to cull the staves, and to make reasonable advances from time to time as the progress of the work should warrant, the expenses of the culler and interest on money advanced to be

charged to the joint account. The staves to be considered, whether marked or not, the property of the plaintiff as security for advances.

Held, that under this agreement the staves were the property of the plaintiff as soon as made, and not the property of M.; and that the Bills of Sale Act did not apply.

Meredith, for the plaintiff.

Gibbons, for the defendant.

CORPORATION OF ANCASTER V. DURAND ET AL.
Tolls—Demise of—Right to make—Bylaw—Toll gate outside township limits.

Action on a bond made by D. and two others, sureties for the payment of the purchase money arising under a lease to D. of a toll gate, and of the right to collect the tolls thereat.

Held, under the circumstances of this case, that the fact of the toll gate being placed on the Barton side of the road, Barton and Ancaster being adjoining townships, was no objection to the demise; that there was the right to demise; and that although there should have been either a general or special by-law for such purposes, the defendant could not raise the objection for the first time in his notice of motion to set aside a verdict entered for the plaintiff.

Osler, Q.C., for the plaintiffs.

MacKelcan, Q.C., for the defendants.

GALLAGHER V. GLASS.

Assignment for creditors—Trust to carry on business—Validity.

An assignment in trust for creditors of a small stock of goods, valued at about \$230, and a lot of land, made to a person not a creditor, and without consulting the creditors, contained a provision empowering the assignee to carry on the business and wind it up, no time being stated therefor, to pay all salaries, wages, etc., and all advances made in goods and money for conducting said business in the winding up thereof, and in his discretion to call a meeting of creditors, or otherwise to take their advice in the winding up; also to sell the lands as to him should seem best. On an interpleader issue between an execution creditor and the assignee:

Held, (WILSON, C.J., dissenting), that the deed could not be supported.

Bartram, (of London), for the plaintiff.

Gibbon, (of London), for the defendant.

SEARS v. AGRICULTURAL INS. CO.

Insurance—Nonpayment of premium note—Variation condition therefor—Reformation.

A premium note, dated 24th May, 1880, given on effecting an insurance with the defendants' company, stated that the insured, for value received in policy No. 1305, promised to pay the company \$14.50, on 24th December, 1880, with interest at 7 per cent., and contained an agreement that if the note were not paid at maturity the whole amount of the premium should be considered as earned, and the policy null and void so long as the note remained unpaid. Upon the policy, which was dated 14th May, 1880, and took effect from the 24th May, 1880, was endorsed a variation condition that the policy should not be valid or binding until the premium was actually paid, unless credit was given, for in that case it was a condition of the contract that if the premium were not paid ———, 18——, the whole amount of the premium should be considered as earned, and the policy null and void so long as any part thereof remains unpaid. The application stated that the premium was due the 24th May, 1880.

Held, that the omission to fill in the blank in the condition, which was the same as sec. 48 of R. S. O., c. 161, did not prevent its operating, for the condition would be perfect omitting the figures "18" altogether, but if necessary the condition could be reformed by inserting the words evidently intended, "24th May, 80."

Held, also, that the condition was not unreasonable.

The fire occurred on the 13th September; on the 15th, the plaintiff, through a solicitor, paid the amount of the note to the defendants, who were ignorant of the loss. On the 17th May, notice and proofs of loss were sent to the defendants, when they immediately repaid back the money to the solicitor.

Held, that the payment, being made in fraud of the defendants, could not avail the plaintiff.

Macdonald, (Kingston), for the plaintiff.

Britton, Q.C., for the defendants.

SMITH v. FORBES ET AL.

Broker Discretion—Ratification.

Action against the defendants, stockbrokers, carrying on business at Toronto, for breach of

duty, in not buying for plaintiff certain stock. On Saturday March 25th, plaintiff instructed defendants by telegram to buy certain stock at 114 or less. The telegram was received too late to enable defendants to act that day. On the following Monday, the 27th, they telegraphed plaintiff that they had cancelled his order in the meantime, as there were unfavourable rumours about the stock, and that they would write. The plaintiff received this telegram on the same day about noon, but did not answer it, but waited for the defendants' letter. The letter was received about 5 o'clock on the following day, Tuesday the 28th, and was to the same effect as the telegram, and asked plaintiff to repeat order if he wished defendants to act for him. The plaintiff replied by letter, which, after acknowledging receipt of defendants' letter, stated that from defendants' telegram he was prepared for something a good deal more tangible as a reason for not filling his order than the mere general unfavourable impressions described in defendants' letter, and something more definite than suspicion had caused it and therefore waited for the letter; that he thought he was justified in expecting the defendants to make good any decided advance; that he had given defendants a positive order to buy, knowing well that in the important decline which had taken place the air would be full of rumours and uncertainty, but having faith in the ultimate result he was willing to risk his money; that he had just telegraphed them as to how market closed that day. The telegraph stated that letter was received; that he did not think defendants were justified in not buying, and asking, as intimated in his letter, how market closed. The defendant, on 29th, telegraphed in reply that last sale yesterday 120, market very uncertain.

Held, that the above correspondence shewed the plaintiff ratified or assented to the defendants' course of conduct in disobeying his instructions, and exercising their discretion, and that the construction was a matter for the Court, and not for the jury; at all events no damage was proved, as the contract was broken on Monday, when the stock was at 114. The plaintiff therefore was held not to be entitled to recover.

Falconbridge, for the plaintiff.

McMicheal, Q.C., for the defendant.

MCNAB v. PEER.

Tax deed—Questioning within two years—Interested party—Statute of Elizabeth—Indigent Debtors' Act.

Under sec. 1 of 37 Vict., c. 15, O., a tax deed is valid and binding, unless questioned before a Court of competent jurisdiction within two years by a person interested. One O., claiming under a sheriff's deed, on a sale under an execution against lands, and also under a deed from one M., filed a petition, under the Quieting Titles Act, against the plaintiff, the grantee under a tax deed, within the two years, to quiet the title to the land. The plaintiff appeared and filed his claim under the tax deed, which was opposed by O. The plaintiff afterwards withdrew it and abandoned it, and an order was made by the referee barring his claim. An order was subsequently made by the referee dismissing O.'s petition, which order was affirmed on appeal to a judge.

Held, that O. was not a person interested within the meaning of the Act, for that the sheriff's deed conveyed no interest, as one of the defendants to the suit was dead at the time the execution issued; and neither did M.'s deed, for the evidence shewed that it was a breach of trust on his part; and the transaction was a fraudulent one on the part of both parties.

Held, also, that a deed of assignment of land in trust to pay certain creditors, and to pay over any surplus to the assignor, is not, under the statute of Elizabeth, a contrivance to defraud or defeat creditors; and that sec. 18 of the Indigent Debtors' Act did not refer to real property.

Per OSLER, J.—The proceedings under the Quieting Titles Act were a questioning of the deed, within the meaning of the 37 Vict., c. 15.

Per WILSON, C.J.—The proceedings had no such effect, as the questioning means a successful questioning.

MacLennan, Q.C., for the plaintiff.

Leith, Q.C., for the defendant.

MCLEAN v. GARLAND.

Assignment for creditors—Restriction to scheduled creditors—Validity.

A deed of assignment to the plaintiff, a creditor, for the benefit of creditors, after reciting that the assignor was indebted in sundry sums which he was unable to pay, and was desirous of mak-

ing a fair and equal distribution of his property and effects amongst his creditors, for the purpose of paying and satisfying, rateably and proportionately and without preference and priority, all his creditors their just debts, conveyed all his property to the plaintiff in trust to sell, and out of the proceeds to pay in full the several debts, etc., then due by the assignor to the plaintiff and the several other persons and firms "designated in the schedule annexed marked B., but if not sufficient for such purposes then rateably amongst such scheduled creditors."

Held, that the deed was void as against creditors, the trust to pay being restricted to scheduled creditors.

A. C. Galt, for the plaintiff.

Walker, (of Hamilton), for the defendant.

CHANCERY DIVISION.

Boyd, C.]

[Dec. 1, 2, 6.

MERIDEN v. LEE.

Interpleader issue—Cognovit actionem—Fraudulent preference—R. S. O. c. 118.

Where a creditor knowing his debtor to have recently given a chattel mortgage on all his stock in trade, and knowing him to be hopelessly insolvent, and, under threat of suit, induces him to give *cognovit actionem*,

Held, that the judgment and execution recovered upon a *cognovit* so given are fraudulent and void as against subsequent execution creditors, under R. S. O. c. 118.

Held also, that such a transaction cannot be supported on the ground of pressure. *Ex parte Hall*, 19 C.D. 580, followed.

Proudfoot, J.]

[Jan. 10.

DIXON v. CROSS.

Right of way—Way of necessity—Injunction—Deed—Registration—Notice.

A. and B., being tenants in common of 100 acres of land, made a partition thereof, whereby 50 acres were allotted to each in severalty. The 50 acres allotted to A. were land-locked, and there was no way out to the highway, except over the 50 acres of B., and a right of way, over B.'s 50 acres, was settled and agreed on between them. The course of this way was subsequently

changed by agreement between the predecessors in title of the plaintiff and defendant, but no deed was registered. A's parcel subsequently became vested in the plaintiff, under conveyances granting not only the land but also all ways, etc., therewith used and enjoyed. The plaintiff also claimed title to the way in question under a deed from one of the defendant's predecessors in title of B.'s 50 acres, which was not registered until 22nd May, 1882. The defendant claimed title to part of B.'s 50 acres by deed made in 1854, without notice of the alleged right of way.

The way in question was used by the plaintiff and his predecessors in title for 30 years, prior to the obstruction thereof by defendant, to restrain which this action was brought.

Held, that the plaintiff's right of way being a "way of necessity," it was not necessary for the plaintiff to show any express grant of the right of way, by the defendant or his predecessors in title.

Held, also, that the "way of necessity" passed under the grant of the land and "all ways, etc., used and enjoyed therewith."

Held, also, that the subsequent express grant of a right of way, by the defendant's predecessor in title, did not destroy the right to a way of necessity.

Held, also, that the plaintiff was entitled to the user of the way in question as a "way of necessity," notwithstanding the non-registration of the deed whereby it was granted by the defendant's predecessor in title, and to an injunction restraining obstruction thereof by the defendant.

Held, also, that the defendant, having actual notice of the plaintiff's use of the way, must be presumed also to have knowledge of the right by which it was enjoyed.

Held, also, that if the way in question were not a "way of necessity" it would, nevertheless, have passed to the grantee of the land to which it was appurtenant, and "all ways used and enjoyed therewith," following *Langley v. Hammond*, L. R. 3 Ex. 171; *Watts v. Kelson*, L. R. 6 Cby. 174; and *Kay v. Oxley*, L. R. 10 Q.B. 366.

Proudfoot, J.]

[Jan. 10.]

BEEMER v. OLIVER.

Estoppel—Insolvency—Creditor—Acquiescence—Sheriff's sale—Fraudulent conveyance.

The plaintiff, an execution creditor, purchased at sheriff's sale, under execution, certain lands of which the registered title was then in the execution debtor; but in a subsequent suit, by the assignee in insolvency of the husband of the execution debtor, to which, however, the sheriff's vendee was no party, judgment was obtained declaring that the conveyances whereby the lands had been transferred from the insolvent to his wife were fraudulent, and the assignee thereupon proceeded to sell the lands as part of the estate of the insolvent, the sheriff's vendee attending and forbidding the sale. At this sale the defendant became the purchaser, and the proceeds of this sale, together with the other assets of the insolvent estate, were distributed by the assignee, and the plaintiff, being also a creditor of the insolvent, accepted a dividend in common with the other creditors.

Held, by accepting the dividend, part of which was paid out of the proceeds realized by the assignee out of the sale of the lands in question, the plaintiff was estopped from impeaching the sale by the assignee. *Cairncross v. Lorimer*, 7 Jur. N. S. 149, followed; *Millar v. Hamelin*, before OSLER, J., not yet reported, distinguished.

Held, also, that the purchaser from the assignee was entitled to avail himself of any defence which would have been open to the assignee.

Proudfoot, J.]

[Jan. 10.]

HENDRIE v. G. T. R. CO.

GRAND TRUNK RAILWAY CO. v. TORONTO, GREY AND BRUCE RAILWAY CO.

31 Vict. c. 40, s. 21 (O.)—38 Vict. c. 56, s. 13 (O.); 44 Vict. c. 74, s. 14 (O.)—Bondholders—Toronto, Grey and Bruce Railway Co.—Voting—Right to vote as shareholders.

Under a statute which provided that in the event at any time of the interest upon the bonds of a railway company remaining unpaid and owing, then at the next general meeting of the Company, all holders of bonds should have and possess the same rights and privileges, and qualifications for directors and for voting, as are attached to shareholders, provided that the bonds, and any transfers thereof, should have

been first registered in the same manner as was provided for the registration of shares.

Held, that the words "the next general meeting" were merely indicative of the earliest period at which the bondholders might vote, and that the statute did not intend to require a new registration so long as the interest remained unpaid.

Held, also, that the bondholders' right to vote was not limited to the right of voting for directors, but that they had the right to vote on all subjects properly coming before a general annual meeting upon which shareholders might vote; and where a statute extended the bondholders right of voting to "special meetings."

Held, also, that the bondholders had the like right to vote on all subjects coming before "special meetings."

Where a statute authorized a Railway Company to enter into agreements with other companies for leasing or running its line, provided that assent thereto should be given by at least two-thirds of the shareholders present, or represented by proxy, at any meeting specially called for the purpose,

Held, that the word "shareholders" must be interpreted to include all who were entitled to vote as shareholders, and was not restricted to the actual shareholders of the Company.

Held, also, that the registered bondholders were entitled to vote at a special meeting called for the purpose of obtaining the assent of the shareholders to such an arrangement on the question of its adoption.

Held, also, that the votes of registered bondholders having been rejected, the arrangement though confirmed by two-thirds of the actual shareholders present, or represented, was nevertheless not properly confirmed within the meaning of the statute.

PRACTICE CASES.

The Master at Hamilton, }
Proudfoot, J. } [Feb. 22, 1881.

DUFF V. CANADIAN MUTUAL FIRE INSURANCE COMPANY.

Costs—Liability of company composed of different branches—R. S. O. cap. 161, ss. 66, 67.

A solicitor's claim for costs after retainer by the Canadian Mutual Fire Insurance Company, was held to be a necessary expense of the com-

pany, and not of any particular branch of it, the same as rent, fuel, etc., and was, therefore, payable out of any moneys which the company might have on hand. The amount should afterwards be apportioned among the branches, as the Directors might determine, under R. S. O. cap. 161, sec. 67.

The word "claims" in sec. 66 of that Act, means claims for losses by fire, and not accounts for expenses of the company.

Duff, for the plaintiff.

Laidlaw, for the defendants.

Osler, J.]

[March 16, 1881.

JONES V. GALLOW.

Action for breach of promise of marriage—Examination—R. S. O. cap. 62.

Since 33 Vict. cap. 13 (O.), neither of the parties to an action for breach of promise of marriage can be called as a witness of the opposite party.

Discovery by means of oral examination under R. S. O. cap. 50, sec. 156 *et seq.*, substituted for the old practice of administering interrogatories, must be limited to the cases in which the party to be examined is compellable to give evidence by or on behalf of the opposite party, and hence does not apply to actions of this nature. See 45 Vict. cap. 10 (O.), assented to 10th March, 1882.

Mulock, for appellant.

Clement, contra.

Boyd C.]

[Dec. 20, 1882.

GOUGH V. BENCH.

Specific performance—Damages.

The action was brought to set aside a contract made by the plaintiff with the defendants for the sale of certain land. The defendants, by way of cross relief, asked to have the contract specifically performed, or for damages.

The Court, on a hearing, declined to decree specific performance, and directed a reference to the Master at Orangeville, to ascertain the damages (if any) sanctioned by the defendant.

The Master, by his report dated 30th Nov., 1882, certified that the defendant had sustained damages by reason of the costs of investigating title, etc., to the extent of \$11.05. The contract price of the land was \$3,000; and the report

CORRESPONDENCE.—ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

further stated that the true value of the land at the time the defendants were entitled to a conveyance was \$4,000, and that if the Court considered the defendant entitled to such damages, the difference was \$1,000, but the Master declined to allow this class of damage.

On appeal,

BOYD, C.—The finding of the Judge who tried the cause, that no actual fraud was proved against the purchasers, influenced the Divisional Court in not making a decree for the revision of the contract, but by no means thereby affirmed the right of the defendant to receive compensatory damages for his loss of the bargain.

We considered his conscience to be so far affected, that we would not give him the benefit of his bargain specifically, and we did not intend, while referring it to the Master to assess his damages (if any), to give him the benefit of his bargain in the shape of a money payment to the extent of \$1,000, which is in effect a confirmation of our view that he had 'over-reached to that extent the old woman with whom he was dealing. It was referred to the Master under the authority of *Pasey v. Hanlon*, 22 Gr. 445, as we did not know what expenditure of money, or outlay the defendant might have made on the faith of his bargain being completed, and of which it would not be fair to deprive him. I do not regard the Common Law cases cited as to the measure of damages when the vendor can convey, but refuses to do so, as at all applicable to the proper disposition of the matters referred to the Master. The appeal is dismissed with costs.

Bain, for the defendant, appellant.

McMillan (Orangeville), contra.

Trade-mark Use of name.

The business of a biscuit maker was sold, "with the goodwill and all advantages pertaining to the name and business" of the vendor.

Held, that this included the trade-mark, and the vendor could not continue to use a trade-mark exactly like that formerly used by him, though it consisted of his own name and arms stamped on the biscuit. Q. B. Quebec, *Thompson v. McKinnon*.

--*Legal News*, Dec. 2, 1882.

CORRESPONDENCE.

Registration of Wills.

To the Editor of the LAW JOURNAL.

SIR,—I beg to submit the following answer to query on page 20:—The necessity for registration would arise only in case of a will of lands. A will of lands must be executed according to the *lex loci rei sitæ*. If the notary were the only witness no estate would pass, and registration would be useless. Assuming, however, the will to be valid, one of the alternatives given by R.S.O. c. 111, sec. 63 would have to be complied with. If the original document deposited under that section were in French, the copy, I should say, would necessarily be in that language. The deposit of a translation is not contemplated. I must say I pity the ordinary registrar, especially as no sum is allowed him for lexicon and grammar.

J. F.

January 10th, 1883.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The conflict of marriage laws—*Law Mag.*(Eng.) Nov., 1882.

The methods of jurisprudence—*Ib.*

English procedure on foreign judgments—*Ib.*

Executory devises. --*American Law Mag.*, Dec., 1882.

Capacity to marry. -- *Ib.*

Some disputed question in the law of commercial paper

(1) Stipulation for attorney's fee in promissory note.

(2) Rate of interest after maturity of note.

(3) Liability of third person endorsing before delivery. --*American Law Rev.* Dec., 1882.

The English judicature system. --*Ib.*

Taxation for railroads by New England towns—*Ib.*

Province of the judge in a criminal trial.—*Southern Law Rev.*, Jan.

National common law.—*Ib.*

Wrongful dismissal of servants—duty—action—defence—evidence.—*Ib.*

Decisions of the Federal Courts on questions of State law.—*Ib.*

Appointment of receivers for co-tenants of property.—*Am. Law Reg.*, Dec., 1882.

Common words and phrases.—*Albany L. J.*, Dec. 23., 1882.

Merger on extinguishment in the law of mortgage of real estate.—*Ib.*

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1882.

During this term the following gentlemen were called to the Bar, namely:—

Messrs. John Donald Cameron and Charles Walker Oliver, with honors; and Messrs. John Campbell, Ferrie Bown, Charles Joseph Leonard, Ernest Edward Kittson, Victor Alexander Robertson, Loftus Edwin Dancy, J. Hamilton Ingersoll, Henry Walter Hall, Robert Abercrombie Pringle, John Calvin Alguire, Frederick, Augustus Knapp, John A. Robinson and James Martin Ashton.

And the following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—Spencer Love Francis Robert Latchford, John Alfred McAndrew, Henry Walter Mickle, Alfred Mitchell Lafferty, Charles True Glass, Arthur Eugene O'Meara, Angus McMurphy, Edward George Graham, Robert Hall Pringle, Smith Curtis, Willoughby Staples Brewster, John Frederick Grierson, Edward Kirwan C. Martin John Shilton, Christopher Robinson Boulton, Fenwick Williams Creelman, William Hume Blake, Francis Wolferstan Goodhue Thomas, William Morris, Alexander Clive Morris, David Fasken, James Baird, Frederick C. Wade, Geo. Sandfield Macdonald, George Goldwin Smith Lindsay, Alfred Herman Gross.

Matriculants—Joseph Stockwell Walker, George Ira Cochrane, D'Arcy DeLessart Grierson, Edward James Barrow Duncan, Francis Hall, John Franklin Wills, Henry Parker Thomas, William Francis Johnston, Thomas Atkins Wardell, William Howard Hearst, Norman McDonald, W. J. Millican, John McKay, Robert C. LeVisconte.

Juniors—Herbert Alfred Percival, John Healy Reeves, James S. Chalk, John Henry Alfred Beattie, Wesley Byron Lawson, Henry Newbolt Roberts, Frank Foley Lemieux, James Percy Moore, James Herbert Sinclair, George Herbert Dawson, Neil McCrimmon, John Young Murdoch, Gordon Joseph Leggett, George Henry Hutchison, George Luther Lennox, Richard Alexander Bayley, Edward Albert Crease, Joseph H. Jack, John Williams Bennett, Malcolm McLean, William George Burns.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From	Arithmetic.
1882	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1882, 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum, B. G. B. IV., c. 20-36, B. V. c. 8-23.
1882.	Cicero, Pro Archia.
	Virgil, Æneid, B. II., vv. 1-317.
	Ovid, Heroides, Epistles, V. XIII.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
1883.	Cæsar, Bellum Britannicum.
	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
1884.	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
1885.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.
Composition.

Critical Analysis of a selected Poem:—

1882—The Deserted Village.
The Task, B. III.

LAW SOCIETY.

- 1883—Marmion, with special reference to Cantos V. and VI.
 1884—Elegy in a Conny Churchyard.
 The Traveller.
 1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

- 1883 { Emile de Bonnechose, | 1882 { Souvestre, Un
 1885 { Lazare Hoche. | 1884 { philosophe
 sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics, 7th edition and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articulated clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1882, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

William's Real Property; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.

Easter Term, third Monday in May.

Trinity Term, first Monday after 21st August.

Michaelmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the second Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the second Thursday before these Terms.

The First Intermediate and Solicitor Examinations will begin on the Tuesday before Term at 9 a.m.

The Second Intermediate and the Barristers Examinations will begin on the Thursday before Term at 9 a.m.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Benchor during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees.....	\$ 1 00
Student's Admission Fee.....	50 00
Articled Clerk's Fee.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " ".....	100 00
Intermediate Fee.....	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions.....	2 00
" Diplomas.....	2 00
" Certificate of Admission.....	1 00

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VOL. XIX.

FEBRUARY 1, 1883.

No. 3.

DIARY FOR FEBRUARY.

1. Thu... Examination for Call and Second Intermediate.
2. Fri... Examination continued.
4. Sun... *Quinquagesima Sunday.*
5. Mon... Hilary Sittings begin.
6. Tue... Hagarty, C.J., C.P., sworn in, 1856.
7. Wed... Ash Wednesday.
9. Fri... Queen Victoria married, 1840.
10. Sat... Lord Sydenham Gov.-General of Canada, 1840. R.
E. Caron Lieut.-Gov. Quebec.
11. Sun... *Quadragesima Sunday.*
12. Mon... Last day to move against Municipal Elections.

TORONTO, FEB. 1, 1883.

THE large increase of business in the Court of Chancery is partly shown by the fact, as stated by Mr. Justice Taylor on the occasion hereafter referred to, that in the first twenty years of the existence of the Court of Chancery there were ten volumes of decrees and orders, whilst in the next twenty years there were fifty volumes, many times larger in size, used for similar purposes; and that as to the amount of money in Court, there was an increase from about \$150,000 to \$3,000,000 in the space of sixteen years.

MR. JUSTICE TAYLOR now makes the third occupant of the Bench who had previously filled the office of Master in Chancery, the other two being the present Chief Justice of Ontario, who held the office from 1837 to 1850, and the present Chancellor of Ontario, who held the office from 1870 to 1873. Both the Chief Justice and Mr. Justice Taylor were promoted directly from the Master's office to the Bench, but the Chancellor had resumed practice at the Bar prior to his elevation.

Considering that there have been but four Masters in Chancery since the office was established, and three of them are now occupants of the Bench, the office of Master of

the Supreme Court into which it has been merged, may, perhaps, not unreasonably, be looked upon as a stepping stone to the Bench.

WHERE the judiciary is elective and a man is one day a judge and the next an advocate, it is necessary, we presume, that the temporary occupant of the judicial chair should, so to speak, "keep his hand in" by an occasional rhetorical flight such as is known to be dear to the average American citizen. It is also a comfort to a precedent abiding profession to know that though they may throw themselves away by going on the Bench, they have still "authority" for such bursts of eloquence as that of Speer, J., of the Supreme Court of Georgia, in a case which we find reported in a recent number of the *Central Law Journal*. The question was as to compensation to an owner of land by a railway company precedent to occupancy by them for railway purposes. The learned judge thus concludes his judgment:—

"Here is the home of a man venerable in age, in which he has resided with his family for thirty-eight years, planted by the side of the limpid stream, whose waters he utilizes as they flow. He has gathered around him by industry and toil the fruits and flowers of the season, the comforts and conveniences of a well-arranged and much-loved homestead. Around it cluster the memories of a lifetime, treasured in common with those who have grown under his care from infancy to manhood and womanhood under its broad and protecting shadows. In it he was gently descending to old age, loving that quiet and seclusion to which the heart of the old so strongly cling. But the spirit of the age demands this homestead for its iron track upon which its iron steeds may travel to meet the alleged necessities of trade and travel, or to extend their corporate power and dominion. If the beauty

MR. JUSTICE TAYLOR AND THE ONTARIO BAR.

of this homestead is to be invaded and marred, its comforts to be imperiled and its sweet quiet and seclusion to be broken upon with ringing bells, shrieking whistles and thundering trains—let the corporation, in the language of the Constitution, 'first pay adequate compensation to the owner thereof.' Judgment reversed."

MR. JUSTICE TAYLOR AND THE ONTARIO BAR.

On the 22nd ult. an interesting event took place at Osgoode Hall, consisting of the presentation to Mr. Justice Taylor, the former Master in Ordinary of the Supreme Court, of an address from the Toronto Bar, accompanied with a handsome silver tea service and judges' robes, etc. In the absence from Toronto of the treasurer of the Law Society, Mr. D. B. Read, Q.C., presided. After a few words of congratulation by the chairman to the new judge, and of regret at losing him, the following address was read on behalf of Bar by Mr. Charles Moss, Q.C.:—

"To the Honourable Thomas Wardlaw Taylor, Justice of the Court of Queen's Bench for Manitoba:—

DEAR SIR,—The members of the Toronto Bar here assembled congratulate you on the well earned promotion which, while it will give a judge to the Bench of a sister Province, will deprive Ontario of an officer whom it has been our pleasure to see filling important positions in our Courts for more than sixteen years.

We but state what is well known when we say that the advanced and satisfactory condition of that branch of the Courts with which you were connected, is, to some considerable extent, to be attributed to your judgment, learning and activity.

Nor will you, in leaving us, cease to observe the effect of the work done by the learned judges of our Courts and your own efforts, but will find in Manitoba a Bar trained, to a large degree, in Ontario, and not unfamiliar with the publications which bear your name as author or editor.

We congratulate you on having as a brother

judge and chief of the Court, the Honourable Lewis Wallbridge, most worthily called from the Ontario Bar. Nor can we forget that it was from this Bar that his late predecessor was chosen, whose noble work, ending only with his life, was to establish British law over that vast territory where justice, with strong arm and firm voice, 'drills the raw world for the march of mind.'

In bidding farewell we pray that a long and successful career may be yours, and that happiness may attend you and your family.

As some token of remembrance and esteem we beg your acceptance of the accompanying articles. Signed, etc."

Mr. Taylor replied in suitable terms. In the course of his remarks he referred to the most pleasant intercourse which had always existed between himself and the Bar, as well as the other officers of the Court with whom he had been brought in contact, and gave an interesting retrospect of various changes at Osgoode Hall since he had first gone there as an officer of the Court. Reference was also made to the honour he felt at being enrolled in the list of those who have upheld the dignity of our Bench, and to the fact that three Chief Justices of Manitoba had been taken from the Ontario Bar. A large number of the Bar and many personal friends of Mr. Taylor, as also the Chancellor and Mr. Justice Ferguson, were present on the occasion.

NEW ADMINISTRATION OF JUSTICE ACT.

A bill has been introduced at the present session of the Legislative Assembly of Ontario, which requires more than passing notice. The first few sections are devoted to providing for the appointment and duties of an additional judge to the Court of Appeal, who shall assist especially in the work of the Chancery Division when his duties as a justice of Appeal permit. More judicial help is certainly required in the west wing, and things are not in a satisfactory state in the Court of Appeal. As to the appointee (should the bill become

NEW ADMINISTRATION OF JUSTICE ACT—RULES OF COURT.

law) we presume some one will be found to fill the position. But the time has gone by unfortunately, thanks, we suppose, to a spirit of false economy or some imagined political necessity, when the Government of the day can command, at the present miserable pittance given to judges, the best talent at the Bar for seats on the Bench.

Section 6 of the above Act is of rather a surprising character, and the more so as the Bill is introduced by the Attorney-General. The section reads as follows:—

“When in any civil suit or any proceeding in regard to which this Legislature has authority to enact, as hereinafter mentioned, the constitutional validity of any Act of the Parliament of Canada or of the Legislature of Ontario comes into question, the same shall not be adjudged to be invalid *until after notice thereof has been served on the Minister of Justice and the Attorney-General of Ontario*, or at their office respectively.”

This notice is to give full information as to the suit, and when it is to be heard, and is to be served six days before the argument, and the Attorney-General is to be entitled then to be heard as of right.

With all due deference it appears to us that there is some question as to the constitutionality of the above enactment, while there seems no question at all as to its practical expediency. No doubt it will be said that it relates merely to a matter of practice, and so is *intra vires*; but what power has the Local Legislature to enact that a judge shall not declare an Act *ultra vires*—say a Dominion Statute—simply because one of the parties has not given a certain notice? What is the Court to do if the question of the validity of an Act comes up in a case and no such notice has been served? Is the invalid Act in such case to be acted upon as though it were valid? If it is *ultra vires* it is illegal, and is as though it had never been passed, yet this Bill apparently contemplates such an Act being enforced by the judges in such cases as we have supposed. If, on the other hand, this is not in-

tended, is the Court, in a case in which the question of the validity of an Act comes before it, (as it may often do incidentally and in an unforeseen manner,) to forthwith adjourn the further hearing until the required notice is served? What if such a question arises at *nisi prius*? The directions of the judge to the jury may often be greatly affected by the question of the validity or invalidity of a Statute arising in an action. Supposing, in such case, no notice had been served, is the trial to be forthwith adjourned, the witnesses and parties detained, and costs indefinitely increased, in order that the six-days notice may be served?

We admit, if it were possible or could be so arranged, that it would be very desirable that the Crown should be represented on any argument as to the “constitutional validity” of an Act of either Legislature, but we confess we see no way to get over such difficulties as we have suggested. It would of course be possible to provide that the Crown should pay any extra expense incurred, but that is only a minor detail. We trust this measure will not be passed without full consideration.

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RULES OF COURT.
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There is one matter, in which it may be doubted whether the changes wrought by the Judicature Act have proved beneficial, and that is with regard to the power to frame Rules of practice.

Prior to the Act, the Judges of the Superior Courts of law, or any four of them, of whom the Chief Justices must have been two, had power to frame rules of practice for the Common Law Courts, and the Court of Chancery had like power with regard to making rules of practice for that Court.

Of course this system which in practice had worked excellently before the Act, could not be suffered to continue after the practice of these Courts had been assimilated. To have continued it, would inevitably have led very

RULES OF COURT.

soon to the creation of differences in practice, which the aim of the Act was not only to abolish, but prevent in future.

While, however, it is plain that it would have been in the highest degree inexpedient to have permitted each Division to frame rules for its own particular Division, there may be a question whether the scheme which has been adopted is the best that could have been devised.

As we read the Judicature Act there are three, and there may be four, rule-making bodies. *First*, under section 54, ss. 1: The Chief Justices, the Chancellors and the Justices of Appeal, or a majority of five of them, and a majority of the puisne judges of the High Court may together make Rules; under this section, there must be at least nine judges concurring, of whom five, as we have said, must be taken from among the Chiefs, the Chancellor, and the Justices of Appeal. *Second*, under section 54, ss 5: the Chief Justice of Ontario, and the Justices of Appeal, or a majority of them, may make rules and orders for the Court of Appeal; *Third*, under the same sub-section: The Judges of the High Court, as regards matters in the High Court, have all the powers which the Judges of the Court of Chancery, and the Superior Courts of Law formerly had, for the regulation of the practice of those Courts. *Fourth*, under sec. 55, the Lieutenant-Governor in Council may authorize the Chief Justices and the Chancellor to make rules.

The first and fourth mentioned bodies are, it would seem, intended to make Rules for the Supreme Court. The second of them has power merely to make Rules for the Court of Appeal; and the third would seem to have power merely to make Rules for the High Court of Justice, or any Division thereof.

With regard to the power of the Judges of the High Court to make Rules, it seems somewhat doubtful how it must be exercised. The former power to make rules for the Superior Courts of Law, we have seen, was

vested in the Judges of those Courts, or a majority of them, of whom the Chief Justices must have been two (R. S. O. c. 49, s. 45), and in the case of the Court of Chancery, the power was vested in the Court of Chancery *eo nomine*. The effect of the 5th sub-section of section 54, is, apparently, simply to vest in the whole body of Judges of the High Court (not a mere majority of them), the powers formerly vested in the Judges of the Superior Courts of Law, and the Court of Chancery for making rules.

It may, therefore, be a question whether in order validly to frame rules for the High Court of Justice, it is not necessary that all the Judges of the High Court should concur.

With regard to Rules of the Supreme Court, it seems clear that there must be at least nine Judges concurring, of whom five must be taken from among the Chief Justices, the Chancellor, and the Justices of Appeal. If this be correct, then a question naturally arises what is the effect of Rules which are purported to be promulgated as Rules of the High Court and Supreme Court respectively, which have, apparently, not received the sanction of the necessary number of Judges.

The Rules of the High Court of, 22nd and 25th August, 1881, were not sanctioned by all the Judges of the High Court, Proudfoot, J., being absent on the 22nd, and Proudfoot and Armour, JJ., being absent on the 25th. Then, again, the Rules promulgated as Rules of the Supreme Court, passed on the 17th March, 1882, did not receive the sanction of the necessary nine Judges, nor yet were there present a majority of five Judges taken from the Chief Justices, the Chancellor, and Justices of Appeal: the Chief Justice of the Q. B., and the Chancellor, and Burton and Patterson, JJ.A., alone being in attendance.

Thirteen Judges, or even the minimum number of nine, we think, are rather too many to dispose efficiently of matters of this kind. And we believe it is an open secret that there

RULES OF COURT—LAW SOCIETY.

is often great difficulty in securing harmony of opinion as to any proposed new Rule.

Nor do we think this is to be wondered at, when we remember the different systems of practice and the different legal traditions to which the various members of the body of Judges have been accustomed in the past. The Equity section naturally look with fondness on their former practice, and would fain see any further additions or changes in the practice tending in that direction; while the Common Law section naturally enough have predilections in favour of the old Common Law methods, with which they are more familiar. The natural result is a want of unity of purpose. But for this, a new tariff of disbursements, adapted to the practice under the Judicature Act which is urgently needed, and which, we believe, has been a long time in process of incubation, would have been hatched before this. There is a further objection to the present system, arising from the difficulty in getting so large a body of Judges together for a sufficient time for the purpose of the necessary consultation and deliberation. This must always prove a source of delay in passing necessary rules under the present system.

Not only is there a difficulty about getting Rules passed, but there seems an equal difficulty in getting them published. It is an old saying that "what is everybody's business is nobody's business," and we fear this has something to do with this matter. In England we see that the task of making new Rules has been delegated to a committee of Judges, and until some such system is adopted in Ontario, we do not believe that the making of new Rules will ever be satisfactorily accomplished. The ideas of individual judges, like those of ordinary mortals, are sometimes crude, and need the friction of other minds to reduce them to practical working. But this needful attrition of mind could be exercised just as efficiently by the rule-making body being reduced to three or four individuals.

Another advantage of the method we

suggest, would be that more regard would be had to the system of practice established, or to be established under the Judicature Act as a whole, and there would be less danger of crude suggestions of individuals passing into Rules of Court without proper deliberation, or thorough understanding of all their bearings.

We are also inclined to think that a standing committee of this kind might, from time to time, receive valuable suggestions both from the members of the profession, and from the officers of the Court who are practically engaged in working the Act, and who are often more familiar with defects, and the best mode of remedying them, than any Judge can be.

We doubt very much whether the system provided for by section 55 of the Judicature Act will be found to work satisfactorily in practice. The qualities necessary for the position of a Chief Justice, or Chancellor, do not necessarily include the qualification for making Rules of practice, and we are inclined to think a selection by the Judges themselves of a small number from their own body, of those best adapted for this kind of work, would be found more satisfactory.

LAW SOCIETY.

MICHAELMAS TERM, 46 VICT., 1882.

The following is the *resume* of the proceedings of the Benchers during Michaelmas Term, published by authority:—

During this term the following gentlemen were called to the bar, namely:—Alfred Henry Clarke, Joseph A. Culham, Alexander Armstrong Hughson, Charles Edward Jones, Edward Robert Cameron, Frederick W. A. G. Haultain, George Benjamin Douglas, James William Elliott, John McSweyn, James Pitt Mabee, W. R. Cavell, Henry Bogart Dean, Frederick E. Redick, John Christie, Thomas P. Coffee, William Reginald Armstrong.

The following gentlemen received certificates of fitness, namely:—R. S. Cassels, J. C. Delaney, E. R. Cameron, A. H. Clarke, James Thompson, A. A. Hughson, A. Foy, J. W. Elliott, F. H. King, G. B. Douglas, T. P. Coffee, F. W. A. G. Haultain, A. E. W. Peterson, J. Christie, C. McVittie, L. E. Dancy, E. A. Lancaster.

LAW SOCIETY.

The following gentlemen passed their first intermediate examination:—A. Carruthers (1st scholarship), J. A. Valin (2nd scholarship), A. H. Coleman, G. Wall, T. C. Milligan, F. R. Powell, H. F. Jell, A. McKellar, A. M. Dymond, W. E. McKeogh, P. H. Simpson, R. J. Dowdall, H. Morrison, C. R. Atkinson, A. E. Kennedy, J. E. O'Meara, A. G. F. Lawrence, S. D. Biggar, A. Skinner, D. Alexander, and J. Douglas.

The following gentlemen passed their second intermediate examination, namely:—D. K. McKinnon, J. Gordon Jones, F. H. Phippin, J. W. Delaney, W. J. Thurston, W. T. Allan, J. A. McIntosh, W. A. Proudfoot, R. A. Coleman, W. S. Murphy, A. W. Murphy, Wm. Cook, G. Bolster, S. T. Scilly, A. Carswell, J. E. Fullen, F. M. Yarnold, D. T. Symons, and J. B. Fischer.

Messrs. McKinnon, Phippen, and Delaney were awarded respectively the first, second and third scholarships; Mr. J. G. Jones was declared to be not eligible on the ground that he was a barrister-at-law.

The following gentlemen were admitted into the Society as Students at Law, namely:—

GRADUATES.—John Edward Kennedy, David A. McMichael, Ernest Frederick Gunther, James Smith, John Ross, Archibald S. Campbell, Josiah James Godfrey, R. B. Beaumont, James Walker Shilton, Henry C. Fowler.

MATRICULANTS.—W. A. Bell, F. C. Payne, Alexander Patrick Macdonell, S. W. Carson, A. C. Paterson, W. L. M. Lindsay, James T. Doyle, H. Guthrie.

JUNIORS.—W. D. Gregory, G. N. Weekes, C. J. Atkinson, W. H. Easton, C. Fitch, W. P. Torrance, W. S. Hall, T. M. Bowman, T. A. Aycarrst, and J. M. Musson.

ARTICLED CLERK.—Mr. J. M. Quinn was allowed his examination as an articled clerk.

Monday, Nov. 20th.

Present—The Treasurer and Messrs. Cameron, Martin, Ferguson, Bethune, Moss, Foy, Kerr, MacKelcan, Robertson, Read, Leith, Crickmore, MacLennan, J. F. Smith, L. W. Smith, Hoskin, Bell, Britton, McMichael, Murray, McCarthy, Irving.

Mr. MacLennan, from the Reporting Committee, presented their report, recommending that one reporter only be appointed, at an increased salary, to report the Practice Cases.—Adopted.

A rule carrying out the above report was read a first time and was ordered for a second reading on the 21st instant.

Mr. MacLennan laid on the table the returns of the reporters.

Mr. Robinson's letter on the subject of the Triennial Digest was referred to the Reporting Committee, with instructions to report to Convocation.

A letter from Judge Benson was received, resigning his seat as a Benchers.

Messrs. Read, Martin and Moss, were appointed a Committee to enquire and report what,

if any, vacancies have occurred on the Bench by non-attendance or otherwise.

The Report of the Finance Committee, recommending a case as to the legality of the By-law refusing discount on water rate on exempted properties, was adopted.

In answer to the communication from the Mayor of Toronto, Messrs. Read and J. F. Smith were appointed delegates to represent the Law Society upon the Semi-Centennial Celebration Committee.

Mr. J. McWhinnie's petition was granted.

The letter from Mr. James B. O'Brien preferring a charge against a solicitor was read, and referred to the Discipline Committee.

Mr. Moss presented report of Committee on Vacancies.

Ordered, that a Call of the Bench be made for Friday, Dec. 1st, for the election of two Benchers, in the room of Messrs. Benson and Lemon, whose seats are vacated.

Mr. Leith was appointed to the Legal, Education, and Discipline Committees.

Tuesday, Nov. 21st, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Irving, Hoskin, Crickmore, Ferguson, Foy, Kerr, J. F. Smith, Leith, Martin, McCarthy, MacKelcan, Murray, Read, Britton, Bethune, MacLennan, Robertson, Beaty, Pardee, Cameron, and Moss.

Mr. Leith was added to the Library Committee.

On motion of Mr. Crickmore, the last clauses of the Report concerning Mr. Knapp's case were adopted.

Mr. Crickmore moved for leave to introduce a rule based on the said clauses.

The rule was read a first time, and ordered to be read a second time on Saturday, 25th inst.

Mr. Crickmore moved to postpone the election of Examiners to next Easter Term.—Carried.

Mr. Read, pursuant to notice, moved, seconded by Mr. Murray, That it be an instruction to the officers of this Society, that if they have any complaint to make, or grievances they wish redressed, the proper course is to bring the same before Convocation, by memorial or petition, in order to their investigation by Convocation.—Unanimously carried, and ordered to be entered on the journals

Mr. Crickmore moved the adoption of the Report of the Committee as to Leith's "Williams on Real Property."

Mr. MacKelcan moved in amendment, that the words "Leith's Edition" be inserted after the words "Real Property, Williams" in the curriculum, which was adopted.

The letter of W. E. Grace, complaining of the conduct of a solicitor was read, and referred to the Discipline Committee.

The rule as to the appointment of a Practice Reporter, was read a second and third time, and passed.

Mr. T. T. Rolph was appointed Practice Reporter.

LAW SOCIETY.

Mr. Foy gave notice that he would on Saturday next, the 25th inst., move that a committee be appointed to consider some means of putting an end to unlicensed persons acting as conveyancers, and conducting proceedings for sale under powers contained in mortgages; also to consider means to prevent persons who are not barristers-at-law from appearing as agents or advocates in those cases in the Division Court which were not within the jurisdiction of such Court prior to the Division Courts Act, 1880.

Saturday, Nov. 25, 1882.

Convocation met.

Present—The Treasurer, and Messrs. MacLennan, Read, Crickmore, Murray, J. F. Smith, Leith, Foy, Bethune, Ferguson.

The Rule as to applicants for Certificates of Fitness of the class contemplated by section 3 of chap. 140 of the Revised Statutes of Ontario, was read a second and third time, and passed.

On motion of Mr. Murray, the rule amending Rule No. 126 was read a second and third time, and passed.

On motion of Mr. Foy, moved pursuant to notice given last day, Messrs. Britton, Hoskin, L. W. Smith, Bethune, J. F. Smith, were appointed a committee to deal with the matters mentioned in the notice.

Mr. Murray moved, pursuant to notice, to introduce a by-law to establish a fund for the benefit of the widows and orphans of barristers, attorneys, and solicitors, to be called the Law Benevolent Fund.

Mr. MacLennan moved in amendment that the subject of the establishment of such a fund be referred to a select committee, composed of Messrs. Murray, Read and the treasurer.—Carried.

Mr. MacLennan, from the Reporting Committee, presented the Report of the Committee, which was received and read.

Friday, Dec. 1st, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Crickmore, Martin, Hoskin, Murray, Irving, Britton, Read, J. F. Smith, Moss, Foy, MacKelcan, McCarthy, Cameron, L. W. Smith, McMichael.

Mr. Hoskin, from the Committee on Discipline, on the charge made by Mr. O'Brian against a solicitor, reported that a *prima facie* case had been made for enquiry.

The Report was read and received, ordered for immediate consideration, and adopted.

Ordered, that the charge made, and the papers connected therewith, be referred to the Discipline Committee to enquire into and report thereon in the customary manner.

On motion of Mr. Irving, seconded by Mr. Crickmore, Ordered that Mr. Walter Read be appointed Solicitor to the Society.

Adam Hudspeth, Q.C., was elected a Benchler in place of T. M. Benson, Q.C. Mr. Guthrie, Q.C., was elected in place of Mr. Lemon.

Mr. Britton on his notice of motion for the

day, moved that the subject of completing the furnishing of the Society's rooms be referred to the Finance Committee, with power to act.—Carried.

The seventh clause of the Report relating to the triennial digest was adopted.

Mr. Guthrie took his seat as a Benchler.

Saturday, Dec. 9th, 1882.

Convocation met.

Present—The Treasurer, and Messrs. Crickmore, Murray, Ferguson, Irving, Moss, J. F. Smith, MacLennan, Foy, Read, Cameron, McMichael, and Bethune.

Mr. Crickmore presented the Report of the Legal Education Committee on the subject of the examinations, which was received and read.

The Report was ordered to be considered clause by clause.

The Report was adopted.

Mr. Crickmore moved for leave to bring in a rule based on the Report.

Ordered accordingly.

The rule was read a first time.

Ordered for a second reading at the next meeting of Convocation.

Mr. Crickmore moved that the examiners be instructed to act on the said Report at the next examinations as to the conduct of the next examinations in all respects save as to the times at which they are to be held, these to remain for next term as at present.

Ordered accordingly.

Mr. Moss presented a report from the committee on the reference as to unlicensed conveyancers, etc., which was received and read, and ordered for immediate consideration.

Mr. Read moved that the further consideration of the report be adjourned until the next meeting of Convocation.—Carried.

Mr. Crickmore, from the Committee on Legal Education, reported on the petition of Charles Seager for leave to go up for his Certificate of Fitness, recommending that his service be allowed.

The report was ordered for immediate consideration.

Mr. Murray moved that it be referred to the Legal Education Committee to enquire into the circumstances under which Mr. Seager has been practising since the expiration of his Articles, and that the consideration of the report be adjourned.—Carried.

On the consideration of the 6th clause of the report of the Reporting Committee touching the proposed advance to Mr. Hodgins,

Ordered, that it appearing that four parts (being within 80 pages of the whole work) have been issued and distributed, two thousand dollars be advanced to Mr. Hodgins as soon after the first of January as funds are available.

Mr. Moss moved, seconded by Mr. Ferguson, that Mr. Guthrie be appointed on the Legal Education Committee in the place of Mr. Lemon, and Mr. Hudspeth on the County

LAW SOCIETY.

Library Aid Committee in the place of Mr. Benson.—Carried.

Tuesday, Dec. 26th, 1882.

Present—The Treasurer and Messrs. Crickmore, Read, MacLennan, Mackelcan, Foy, Murray, Martin, McCarthy, Irving, Moss, Bethune, J. F. Smith, Cameron.

The report of the Finance Committee of this date was adopted.

The report of the Library Committee of this date was read as follows and was adopted:—

REPORT.

The whole expenditure on Library account for the year 1881 amounted to \$3,625.49.

The whole expenditure on same account for the current year, up to 15th December, 1882, amounts to \$2,132.78, and up to 31st December instant, the accounts to be paid and not yet presented will not, it is expected, make the expenditure for this year beyond \$2,800 in the whole.

The Committee beg leave to bring to the notice of Convocation the continued generosity of Mr. Nathaniel C. Moak, Councillor-at-Law, Albany. The Library has been supplied by him with a copy of his valuable series of English Reports, now numbering thirty volumes, which themselves can only be purchased at a cost of \$180, and he continues to forward to the Society a volume from time to time as published, and he has also presented his edition of "Underhill on Torts" to the Society, "Lowenstein's Trial," and some other works of interest.

The Committee have no doubt that Convocation will be prepared to acknowledge Mr. Moak's liberality suitably, nevertheless they have experienced some difficulty in suggesting the manner of doing so acceptably as well as appropriately.

Mr. Moak's library is so vast and complete that there are no additions required, and the Committee can only propose that the Secretary of the Society be directed to furnish Mr. Moak with a regular supply of the Ontario and Dominion Reports as issued from time to time.

The Library has been opened at night for the winter session since 1st November last.

The average attendance during Michaelmas Term has been 22 each night, and about 12 or 13 out of term.

The attendants are by no means the same persons every night, and the number of individuals who have participated in the use of the Library may be said to be about 72 since the first of November, of whom 18 are of the degree of barrister-at-law.

The Rule as to examinations was read a second time as follows;—

From and after Hilary Term, 1883, the Primary Examinations shall commence on the Tuesday in the third week next before each term, instead of in the second week as at present provided.

2. From and after Hilary Term, 1883, the Intermediate Examinations shall be held in the

second week next before each term, and the examinations for Call and Certificate of Fitness shall be held in the first week next before each term.

3. To entitle any candidate to go in for Honors, he must obtain the number of marks as at present provided by Rules 58 and 91, and those only who are students and in their regular years or course of study, are to be entitled to be passed with honors, unless in any particular cases Convocation shall see fit to award them.

4. To entitle any candidate to pass without an oral, he must obtain at least 55 per cent. of the aggregate marks obtainable upon the written examination papers; and if he shall obtain not less than 50 per cent. of them, he shall be entitled to go in for an oral.

5. For the oral examinations each examiner shall prepare three questions (in addition to the papers already required of him), before the commencement of the written examinations; and at least two examiners shall be present during the oral examinations. Any candidate who shall obtain 33 per cent. of the aggregate of the marks obtainable upon the oral, may be entitled to pass; and those who pass on the orals are not to be ranked according to merit, but alphabetically.

6. Two examiners must, without fail, be present during the whole time of the written examinations for pass; and before the printing the examiners shall meet and submit to each other the proposed questions to be given at each examination.

7. Before the examinations each examiner shall assign and mark a value to each question on his own papers; and a copy of the questions so marked shall be returned to Convocation with the report; and each examiner shall mark opposite to each answer to his own papers, in numbers, the value he shall assign to it; and all the answers so marked shall be returned with the examiners' report, together with copies of the questions used on the orals.

8. The First Intermediate Examinations shall commence on Tuesday, at the hour and in the manner provided by sub-sections 2 and 5 of Rule 47. The results are to be declared at 12 noon on Wednesday. The orals to be held at 2 o'clock p.m. of the same day, and the results to be declared immediately after. The Honor Examinations to be held on Thursday.

9. The Second Intermediate Examinations shall commence on Thursday, at the hour and in the manner provided as aforesaid. The results are to be declared at 12 noon on Friday. The orals are to be held at 2 p.m. of the same day, and the results to be declared immediately after. The Honor Examinations to be held on Saturday, and the reports of the examiners upon all the Intermediate Examinations are to be sent to the Secretary on the following Monday.

10. The Examinations for Certificate of Fitness shall commence on Tuesday, and the Examinations for Call shall commence on Wednes-

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day at the hour, and shall be conducted in the manner already provided, and the results of the examination for Certificate of Fitness are to be declared at 2 p.m. on Wednesday, the results of the Examination for Call are to be declared at 2 p.m. on Thursday. The orals for both Call and Certificate of Fitness are to be held at 2.30 p.m. on Thursday, and results are to be declared immediately after, and on Friday at 9.30 a.m., the Honor Examinations in connection with Call are to be held. The reports of the examiners upon the Examinations for Call and Certificate of Fitness, and for Honors in connection with Call, are to be handed in to the Secretary not later than 3 p.m. on the Saturday before Term.

11. A rota of elected Benchers shall be prepared by the Secretary, who is to notify two Benchers whose turn it is according to the rota to attend, or to provide a substitute to attend on one of the oral examinations, so that at least one Bencher may be present at each of the oral examinations.

12. All parts of existing rules inconsistent with this rule, are repealed in so far as they are inconsistent therewith.

The rule was read a third time, and was passed.

The report of the Committee on the subject of unlicensed conveyancers, agents for powers of sale and Division Court suits, the consideration of which was adjourned until to-day, was brought up.

Mr. Moss, Chairman of the Committee, reported a correspondence with the Attorney-General.

Mr. Murray moved that the report be amended by inserting the words "the second day of next Term," in lieu of the words "26th December inst.," which was carried.

Mr. Moss moved the adoption of the report as amended.

The letter from A. G. McMillan, from San Francisco, as to a certificate of standing, was read, also the draft certificate.

Ordered, that the seal be affixed to the certificate as amended.

Convocation adjourned.

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PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

MCLAREN V. CALDWELL.

R. S. O. cap. 115, sect. 1—Construction of non-floatable streams—Private property.

Appeal from the Court of Appeal of Ontario, whereby a decree of the Court of Chancery in

favor of the plaintiff, (appellant), was reversed. By the decree of the Court of Chancery the defendants, (respondents), were restrained from interfering with the plaintiff's user of certain streams where they pass through the lands of the plaintiff, and which portions of said streams were declared to be, when in a state of nature, not navigable or floatable for saw logs, or other timber, rafts and crafts.

On appeal to the Supreme Court of Canada on the question at issue between the parties, viz.:—Had the appellant the legal right to prevent, as he sought by his bill to prevent, the respondents driving their logs through his lands, and in doing so to utilize the improvements owned by him on and along the streams in question, or are those streams part of the public highway, and therefore open to the free use of the respondents in common with the appellant and the public generally?

Held, that the learned Vice-Chancellor who tried the case having determined that upon the evidence adduced before him, the streams, at the *locus in quo*, when in a state of nature, were not floatable without the aid of artificial improvements of one kind or another, and such finding being supported by the evidence in the case, the appellant had at common law the exclusive right to use his property as he pleased, and to prevent respondents from using as a highway the streams in question where they flowed through appellant's private property.

2nd. *Held* also, (approving *Boale v. Dickson*, 13 U. C. C. P. 337), that although, by 12 Vict. c. 87, sect. 5, it is enacted "that it shall be lawful for all persons to float saw logs and other timber, rafts and crafts down all streams in Upper Canada during the spring, summer and autumn freshets, etc.," such legislation (re-enacted by ch. 115, R. S. O. sect. 1,) extends only to streams as in their natural state would, without improvements during freshets, permit saw logs, timber, etc., to be floated down them, and that the portions of the streams in question, where they pass through appellant's land, were not within said ch. 115, R. S. O. sec. 1.

Decree restored.

Cameron, Q.C., Dalton McCarthy, Q.C., and Creelman, for appellant.

J. Bethune, Q.C., and Church, Q.C., for respondents.

THE QUEEN v. MEAL.

(Crown Case Reserved.)

Indictment—Misjoinder of counts—evidence.

An indictment contained two counts, one charging the prisoner with murdering M. I. T. on the 1st November, 1881; the other with manslaughter of the said M. I. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held, (affirming the judgment of the Supreme Court of New Brunswick,) that the indictment was sufficient. The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle. She fell against the door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards, and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

Held, (affirming the judgment of the Court *a quo*), that there was evidence to leave to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner, and that the evidence of violence committed within a year was properly received.

Lash, Q.C., for appellant.

M'Leod, Q.C., for the Crown.

GRAND JUNCTION RAILWAY CO. v. COUNTY OF PETERBOROUGH.

Municipal by-law — Validity of — Remedy—Action at law and not by mandamus—34 Vict. c. 48 (O.)—Construction of.

This was an appeal from the Ontario Court of Appeal, reversing the rule of the Court of Queen's Bench granting a writ of *mandamus*, commanding the corporation of the County of Peterborough to issue debentures for \$75,000 and interest, in accordance with the terms of a certain by-law respecting the said Grand Junction Railway Company and the Peterborough & Haliburton Railway, alleged to have been passed

by the County Council, and adopted by the rate-payers. The Grand Junction Railway Company was amalgamated with the Grand Trunk Railway of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railroad Co., but gave it a slightly different name, and made some changes in the charter. On the 23rd November in the same year, the ratepayers of the defendant municipalities voted on a by-law to grant a bonus to the plaintiff company, construction of the road to be commenced before the 1st May, 1872. The by-law was read twice only. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February 1871, the Act 34 Vict. c. 48 (O.) was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year, c. 30 was passed, giving power to municipalities to aid railways by granting bonuses. The 37 Vict., c. 43 (O.) was passed, amending and consolidating the Acts relating to the plaintiff company. Time for completion was extended by 39 Vict. c. 71 (O.).

Held, (1) that the effect of the Statute 34 Vict. c. 48 (O.), apart from any effect it may have of recognizing the existence of the Railway Co., was not to legalize the by-law in favour of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, therefore, the appellants could not recover the bonus from the defendant.

Per Gwynne, J. (FOURNIER and TASCHEREAU, JJ., concurring).—That as the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in which delivery of the debentures to trustees on behalf of the company, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is, in the Province of Ontario, by actions at law or in equity under the provisions of the statutes in

force there regulating the proceedings in actions, and not by summary process by motions for the old prerogative writ of *mandamus*, which the writ of *mandamus* obtainable upon motion without action, still is.

Appeal dismissed with costs.

C. Robinson, Q.C., and H. Cameron, Q.C., for the appellants.

Bethune, Q.C., and Edwards, for the respondents.

FRECHETTE V. GOULET.

(Mégantic Election.)

Preliminary objections—Onus probandi.

In this case a petition was presented by the respondents complaining of an undue election and return for the County of Mégantic at the last election for the House of Commons. The petition was met by preliminary objections, in which the sitting member alleged, *inter alia*, that the petitioners were not electors, nor qualified to vote at the election in question, etc. A day was fixed for the hearing of the preliminary objections at Arthabaska, when Mr. Justice Plamondon held that the *onus probandi* was on the defendant (present appellant), to support his preliminary objections, and no evidence being offered by either party, dismissed them with costs.

On appeal to the Supreme Court of Canada,

Held, (per FOURNIER, HENRY, and GWYNNE, JJ.) following the practice adopted by the Superior Court of Quebec, sitting as an Election Court in the case of *Duval v. Casgrain*, that the *onus probandi* was on the party alleging preliminary objections.

Contra, RITCHIE, C.J., and STRONG and TASCHEREAU, JJ.

The Court being equally divided the appeal was dismissed without costs.

Crepeau and Gormully, for appellant.

Irvine, Q.C., for respondent.

GRANT V. BEAUDRY.

Action for false arrest against magistrate—Notice—C. S. L. C. ch. 101, sect. 1.

David Grant, who was the plaintiff in the first instance, was Grand Master of the Orange Order in Montreal during the troubles of 1877-78. As such he was arrested for disturbing the peace, and brought an action against Mayor Beaudry for false arrest.

The notice given by appellant's attorney to the respondent was as follows:—

To the Hon. J. L. Beaudry, Mayor of Montreal,

SIR,—We give you notice that David Grant of the City of Montréal, salesman and trader, will claim from you personally the sum of ten thousand dollars damages, by him suffered from the abuse made of your authority in causing his arrest illegally and for no cause on the twelfth day of July last (1878), and that unless you make proper amend and reparation of such damages within a month, judicial proceedings will be adopted against you. Yours, etc.,

(Signed) Doutre, Branchaud & McCord,

Advocates for Plaintiff

Montreal, 19th October, 1878.

The Superior Court dismissed the action for want of proper notice. This judgment was confirmed on appeal to the Court of Queen's Bench, (P.Q.) but the Court went further, and stated that Grant was properly arrested, being a member of an illegal association.

On appeal to the Supreme Court of Canada,

Held, that the notice was insufficient, and that an expression of opinion as to the legality or illegality of the Orange association would be extra judicial and unwarranted.

Appeal dismissed with costs.

Doutre, Q.C., for appellant.

R. Roy, Q.C., for respondent.

CALDWELL ET UX. V. THE STADACONA FIRE INSURANCE CO.

Policy—Proofs of loss—Waiver—Estoppel—Insurable interest—Surrender.

This was an action upon a fire policy by appellant against respondent company. The policy was under seal, and purported to be effected in favour of the appellant Samuel Caldwell. It contained, however, a provision in the following words:—"Loss, if any, payable to George R. Anderson, Esq." One of the conditions provided that the company might require the policy "to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a ratable proportion for the unexpired term thereof of the premium received for the insurance." Another condition required particulars and proofs of loss within five days after such loss or damage has occurred. And another condition is in these words:—"None of the foregoing conditions or

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stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company, unless the waiver be clearly expressed in writing by endorsement on the policy, signed by the manager of this company for Canada." The defences pleaded *inter alia*, that the amount of loss was payable to Anderson; that there had been a breach of condition requiring proof of loss to be delivered within five days; that the policy had been delivered up and cancelled, and the risk terminated. To the plea of non-delivery of proofs, plaintiff replied a waiver of the conditions in that respect, to which the defendants rejoined that the waiver was not in writing as required by the conditions.

The policy was issued on the 10th August, 1875, and while in force the appellants conveyed the property on which the insured building was erected, to one T. B. in fee, who on the next day conveyed the same to the appellant Sarah C. Caldwell in fee. On 30th June, 1877, the respondent's agent at Halifax, sent to Anderson, who held the policy for his security as mortgagee, a circular to the effect that the company had cancelled the policy, adding that "the unearned premiums will be returned hereafter." Anderson handed the policy to the agent, who was also agent for the Western Assurance Company, telling him he wanted to be insured in that company, and the respondents from that date held it, or until it was produced by them on the trial. The unearned premium was not returned or offered to be paid. While in this position the fire occurred. At the suggestion of the agent, the putting in of proofs was deferred, to allow him to communicate with his head office, and ultimately they were furnished, and received with objection, and retained by the agent. Plaintiff got a verdict for \$4,000 and interest. The Supreme Court of Nova Scotia on a rule *nisi* to set aside the verdict, made it absolute on the ground that though a waiver of the requirements of the ninth condition as to delivery of proofs of loss within five days had been sufficiently made out, if parol evidence had been admissible, yet that the twelfth condition requiring waiver to be expressed in writing by endorsement on the policy applied, and there had been no such waiver in writing.

On appeal to the Supreme Court, in addition to the defences above stated, it was urged that the appellant Caldwell had not, at the time of

loss, an insurable interest in the property by reason of his change of interest arising from the alienation in favour of his wife by means of the conveyance to B., and the reconveyance to the latter.

Held, (1) (reversing the judgment of the Supreme Court of Nova Scotia), that as the agent of the company had requested the respondent to delay putting in the proofs of loss, the company were estopped from setting up as a defence the 12th condition requiring that a waiver of condition No. 9 should be in writing.

(2) That although the insured, during the currency of the risk, had alienated his interest in the property insured, still at the time of the loss he had such an interest by reason of being seised of an estate in fee simple in right of his wife, as to entitle him to recover.

FOURNIER, J., dissenting, on the ground that the sending of the circular by the company, and the compliance with the terms of the circular by the assured by giving up the policy to the company's agent, had effected a surrender.

Appeal allowed with costs.

Gormully, for appellant.

Casgrain, for respondent.

FARMER V. LIVINGSTONE.

The Dominion Lands Act, 35 Vict. c. 23, sec. 33, sub-sects. 7 and 8—Patent, validity of—Bill—Equitable or statutory title—Demurrer.

This was an appeal from a judgment of the Court of Queen's Bench (in Equity) for the Province of Manitoba, reversing on re-hearing the judgment of Mr. Justice Miller, allowing with costs the demurrer of the appellant (defendant) to the bill of complaint of the respondent (plaintiff), and overruling the said demurrer with costs.

The plaintiff, in his bill of complaint, alleged in the 6th paragraph as follows:—

"Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein and procured proper affidavits according to the Statute whereby he proved to the satisfaction of the Dominion lands agent in that behalf (and the plaintiff charges the same to be true), that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him or the land herein in question, but had been absent therefrom continuously since his pretended homesteading and

pre-emption entries, and thereupon the claim of the defendant Farmer under the said entries became and were forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased. and the plaintiff thereunder on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit according to Form "A" mentioned in 35 Vict. cap. 23, sect. 33, and did make and swear to an affidavit according to Form "B" mentioned in sect. 33, sub-sect. 7 of the same Act, and did pay to the same agent the homestead fee of \$10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the Statute and the regulations of the Department, and that the Statute said, 'Upon making this affidavit and filing it and on payment of an office fee of ten dollars (for which he shall receive a receipt from the agent) he should be permitted to enter the lands specified in the application,' and thereupon and in pursuance thereof and in good faith the plaintiff did forthwith enter upon said lands and take *actual* possession thereof, and has ever since remained in actual occupation and occupation thereof, and has erected a house and other buildings thereon, cleared a large portion of said lands and fenced and cultivated the same, and made many other valuable improvements thereon, costing in the aggregate \$1,000."

To this bill of complaint defendant demurred, assigning as cause, "That the plaintiff hath not, in his bill, shown any interest or right to the lands therein mentioned, or any title to attack the patent of the defendant, and therefore hath not, in and by his said bill, made and stated a case as entitles him to any relief against this defendant."

Held, (reversing the judgment of the Court of Queen's Bench, Manitoba), that the plaintiff had no *locus standi* to attack the validity of the patent issued by the Crown to the defendant, as he had not alleged a sufficient interest or right to the lands therein mentioned, within the meaning of sub-sections 7 and 8 of sec. 23 of the Dominion Lands Act, there being no allegation that an entry of a homestead right in the lands

in question had been made, and that plaintiff had been authorized to take possession of the land by the agent, or by some one having authority to do so on behalf of the Crown. Demurrer held good.

Appeal allowed with costs.

J. Bethune, Q.C., for appellant.

McCarthy, Q.C., for respondent.

CHAPMAN V. TUFTS ET AL.

Unstamped bill of exchange—42 Vict. cap. 17, sec. 13—Knowledge—Question for Judge.

Appeal from the decision of the Supreme Court of New Brunswick, refusing a motion to set aside the verdict and enter a non-suit. The action was brought by the respondents against the appellant to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by respondents, had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought; and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and that they immediately put on double duty stamps.

The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact, the plaintiff knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880.

Held, that the questions as to whether the holder of a bill or draft has affixed double stamps upon such bill or draft so soon as the unstamped state of the bill was brought to his knowledge within the term of 42 Vict. cap. 12, sec. 13, is a question for the Judge at the trial, and not for the jury.

2. That the "knowledge" referred to in the Act is actual knowledge, and not imputed or presumed knowledge, and that the evidence in this case showed that the plaintiff acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880.

Davies, Q.C., for the appellant.

Travis, for the respondents.

CHANCERY DIVISION.

Boyd, C., and Ferguson, J.] [Dec. 16, 1882:
ARNOLDI V. O'DONOHUE.

Costs—Taxation—Solicitor and client—Special circumstances—Delivery of bill.

On 20th July, 1877, a firm of barristers and solicitors who had been employed by a solicitor to perform professional services, rendered their bill for services so performed.

On 30th May, 1878, the solicitor to whom the bill was rendered, wrote claiming a reduction of the bill on the ground of over charge, and also on the ground that the work had been agreed to be done for half fees. No notice was taken of this letter.

In February, 1882, an action was commenced in the County Court on this bill, and judgment entered for default of appearance. This judgment was by consent subsequently waived, and the action in the C. C. discontinued, and a bill for further services rendered since July, 1877, was then delivered on 27th July, 1882. In this bill was included an item, "To amount of judgment entered 19th July, 1882, \$268.67, for previous accounts rendered." An action was then commenced in the Chancery Division for the amount of the two bills.

On the trial of the action, judgment was given for the amount of the first bill as rendered, and also for the amount of the second bill, subject to taxation.

Held, on appeal to the Divisional Court, that neither the existence of a controversy as to the terms on which the business was done, nor the continuance of the employment after the delivery of the first bill, were special circumstances entitling the solicitor to a taxation of the first bill after the lapse of a year.

Held, also, that the reference in the second bill to the amount claimed for the first bill, was not a re-delivery of the first bill.

O. Howland, for plaintiff.

O'Donohue. Q.C., defended in person.

Proudfoot, J.] [Dec. 16, 1882.
MILLER V. BROWN.

Mortgagee and mortgagor—Statute of Limitations—Acknowledgement—Consolidation of mortgages—Registry Act.

D. H. being owner of certain land in Toronto,

on 18th Dec. 1850, executed a mortgage thereon to A. Cruickshank, which mortgage on 12th June, 1851, was assigned to J. H. Cameron, trustee for A. L.

D. H. also on 3rd May, 1851, executed a mortgage jointly with Cruickshank on certain land in the Township of Reach, to A. McDonald, who, on 17th January, 1852, assigned the mortgage to J. H. Cameron, as trustee for A. L.

On 22nd June, 1852, Cameron being then holder of both of the above mentioned mortgages, D. H. conveyed the equity of redemption in the Toronto lands to the plaintiff, which conveyance was duly registered. At that time there also existed a mortgage on these lands to one P. McGill, prior to that assigned to Cameron, which prior mortgage the plaintiff subsequently paid off. The plaintiff, when he received the conveyance from D. H., had no notice of the mortgage held by Cameron on the lands in Reach.

In 1862, Cameron went into possession of the Toronto lands. On 11th May, 1871, he wrote and sent a letter in the following terms to the plaintiff:—"Toronto, 11th May, 1871. Dear Miller—The amount due to me in Nov. 1853, on the Hunter mortgages was as follows: First Mortgage, £112 10s. 0d.; interest, £10 2s. 6d. Second Mortgage, £450 0s. 0d.; interest, £64 15s. 0d. Insurance, £36 0s. 0d. = £676 2s. 6d. No part of that sum has since been paid to me, and the rents I have received have nearly kept down the interest. Yours truly, J. H. Cameron. R. B. Miller, Esquire."

In June, 1876, the plaintiff commenced this action at law against the defendant Brown, who claimed both as purchaser from Cameron and also by possession, for recovery of possession of the Toronto lands. On 8th Sept., 1879, the action was transferred to the Court of Chancery. On 20th June, 1880, a decree for redemption was pronounced, with a direction to make the representative of A. L., and the representatives of Cameron, parties in the Master's office.

On 29th Oct., 1880, the Master made an order adding A. L.'s representative as parties in his office. This order was served on 5th Nov., 1880.

On 15th March, 1882, on application of the representatives of A. L. and of Cameron, an order was made allowing them to put in an answer to the cause. They accordingly put in

an answer setting up defences which had previously been pleaded by Brown, to the effect that the plaintiff was barred by the Statute of Limitations; or, if not, that he could only redeem on payment of what was due on both mortgages.

Held, that the letter of 11th May, 1871, was a sufficient acknowledgement of title, and gave a new starting point from which the Statute of Limitations would begin to run, and that the plaintiff's action having been commenced against the representatives of A. L. and Cameron, on 5th Nov., 1880, the Statute of Limitations was not a bar to the plaintiff's right to redeem.

Held, also, that the right to consolidate the mortgages was an equitable right, incapable of registration, and was, therefore, prior to the Registry Act of 1865, a right which could have been enforced against the plaintiff, but that the Registry Act of 1865, s. 66, and the Registry Act 1868, s. 68, were retrospective in their operation, and had extinguished this right as against the plaintiff, who claimed under a registered deed without actual notice: (*Bell v. Walker*, 20 Gr. 558; *Gray v. Ball*, 23 Gr. 390 followed. *McDonald v. McDonald*, 14 Gr. 133. dissented from.

Moss, Q.C., for plaintiff.

S. H. Blake, Q.C., (*Morphy* with him), for defendant.

Proudfoot, J.]

[Dec. 16, 1882.]

SCOTT V. GOHN.

Will—Codicil—Construction—Substitutional gift—Revocation of bequest—Cumulative bequests.

A testator, by his will, dated 11th January, 1856, directed his residuary estate to be sold, and as to one-fourth made the following disposition: "To my daughter Emily (the plaintiff) the legal interest on one-fourth of the remainder of the proceeds of my estate, to be paid to her yearly and every year during her natural life, and after her death the said one-fourth to be equally divided among her surviving children when the youngest arrives at the age of 21 years, or any portion of it may be paid sooner if my executors think it proper or necessary to do so." By a codicil, dated 4th April, 1858, he devised as follows:

"I, Peter Stiver, etc., do hereby will and bequeath to my daughter Emily Scott (the plaintiff) and her heirs, that share or division of my estate, as referred to in a former will, in land, composed of the North East part of lot No. 7, 3rd concession, Markham, and to be by admeasurement 50 acres."

Held, that the codicil had the effect of entirely revoking the bequest of the one-fourth share of the residue, given by the will to the plaintiff and her children, and must be read as made in substitution of that bequest; and that it made no difference that the devise in the codicil was of land, whereas the bequest in the will was of money.

Held also, that the plaintiff took the fee in the land devised, and that her children took no estate therein.

D. McCarthy, Q.C., and *Reeve*, for the plaintiff.

S. H. Blake, Q.C., for defendant Catherine Miley.

Ferguson, J.]

[Jan. 8.]

GAGE V. CANADA PUBLISHING CO.

Trade mark—Fraud—Injunction—Partnership—Retiring partner.

The plaintiff and the defendant Beatty carried on partnership together, from the 1st May, 1877, to the 28th August, 1879, and during the partnership the defendant Beatty prepared a series of head-line copy books, which were extensively advertised, and by the exertions of the firm widely sold, and which in consequence acquired a great reputation, and large profits were realized from their sale. These books were styled on the covers "Beatty's system of practical penmanship," and were generally known and sold to the trade as "Beatty's Copy Books" and "Beatty's Copies." The firm had registered the books as copyright, but nothing was claimed in the action by the plaintiff by virtue of the copyright.

In 1879 Beatty retired from the firm, his interest having been purchased by the plaintiff for \$20,000—the interest of the firm in the series of copy books being then one of its chief assets. Beatty afterwards, at the solicitation of his co-defendants, the Canada Publishing Company, and in consideration of a royalty to be paid him on the sales, and with the express purpose of enabling the defendant company to publish copy

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books to be called "Beatty's," prepared another series of copy books which differed slightly from those published by the plaintiff, but the Court inclined to the opinion that the differences were merely colourable. These new copy books were styled on the covers "Beatty's new and improved head-line copy book," and were proved to be, and to have been intended to be, in such a form and in such a cover as to lead the public to believe the books were the books published by the plaintiff, and were so published and sold by the defendant company, to the injury of the plaintiff's business.

Held, that the plaintiff had not acquired the right to use the word "Beatty" as a trade mark, but,

Held also, that the conduct of the defendants in publishing their books was fraudulent and collusive, inasmuch as they intended, by simulating the plaintiff's books, to deprive him of profits he would otherwise have made, and that the plaintiff was therefore entitled to a perpetual injunction, restraining the defendants from advertising, publishing or selling, or offering for sale, the book "Beatty's new and improved head-line copy book," in and with its present cover, or in any other form, or cover, calculated to deceive persons into the belief that it was the plaintiff's book.

S. H. Blake, Q.C., and W. Cassels, for the plaintiff.

C. Robinson, Q.C., and Davidson, for the defendants the Publishing Company.

J. Bethune, Q.C., and C. Moss, Q.C., for the defendant Beatty.

Proudfoot, J.]

[Jan. 10.

CHRISTOPHER V. NOXON.

Joint Stock Company—By-law—Annual meeting—adjourned retinue—Shareholders—Voting—Calls—Forfeiture for non-payment of calls—Allotment of stock by directors to co-director—Estoppel—parties—Evidence—Costs.

A general annual meeting of the shareholders of a joint stock company was held pursuant to a resolution moved by one of several plaintiffs, on another day than that provided by by-law.

Held, that the plaintiff moving the resolution, was estopped from objecting to the regularity of the meeting on that ground, and that his co-

plaintiffs by joining in the action were estopped by the conduct of their co-plaintiff.

A shareholder of a company who was in default in payment of his calls, was refused the right of voting on the ground that his stock had been sold by the sheriff, although no transfer had been made in the books of the company.

Held, that the default in payment of calls was of itself a sufficient ground for excluding him from voting, and that such ground might be relied on to justify the rejection of his vote, although not the ground assigned at the time.

By law 4 authorized a call on stock. By-law 5 purported to repeal by-law 4. Both by-laws were confirmed at a general meeting.

Held, the call authorized by by-law 4 could be made.

Where a call was made for the alleged purpose of liquidating debts due by the company,

Held, that the necessity of making the call was a matter affecting the internal economy of the company, which could not, in the absence of fraud, be enquired into at the instance of a dissatisfied shareholder.

Held, also, that the directors were under no obligation to assume any personal liability in order to keep the liabilities of the company, for payment of which the call was made, afloat until they could be paid out of the earnings of company, even though such a course were practicable.

Business which could not have been entertained at a special general meeting of a company cannot without due notice be entertained at any adjournment of that meeting.

Thus, where a special general meeting of a company was called to ratify a by-law providing for the appointment of five directors, and the by-law was affirmed, and the meeting adjourned, and afterwards and before the holding of the adjourned meeting, the directors passed a by-law reducing the number of directors to three,

Held, that it was not competent, in the absence of any notice of this business being brought up at the adjourned meeting to ratify this by-law at the adjourned meeting.

Held, also, that a by-law authorizing the forfeiture of stock for non-payment of calls, passed by a board of three directors, in pursuance of an invalid by-law reducing the directorate from five to three, was also invalid.

Held, also, that a power to forfeit must be strictly construed.

Held, also, that to an action impeaching the validity of a by-law reducing the number of directors, the company was a proper party.

The allotment of stock by directors to one of their number, for the purpose of raising funds to pay off liabilities of the company, even though it have the effect of giving a preponderance of control of the company to the allottee, is not *per se* void. Where such an allotment was made, and the shareholders knew of it, but no objection to the allotment was made, except by a minority, on the ground that the issue of the stock was unnecessary.

Held, that the shareholders could not afterwards object to the allotment on the ground of its giving an undue control over the company to the allottee.

Held, also, that to ratify such a transaction, it was not necessary that all shareholders should assent to it, but that it was sufficient that a majority did so.

Where a plaintiff failed to establish his right to relief on certain of the grounds on which his action was based, although some relief was granted, it was under the circumstances granted without costs.

Evidence of an alleged agreement contemporaneous with, and qualifying, and at variance with a written agreement between the same parties, held inadmissible.

S. H. Blake, for the plaintiffs.

Moss, Q.C., for the defendants other than the Company.

Wells, for the defendants the Company.

Boyd, C.]

[Jan. 12.]

KILROY v. LYONS.

Will—Execution of will—Fraud—Onus probandi—Suspicious circumstances.

In an action to impeach the validity of a will purporting to have been executed on 2nd November, the plaintiff swore that the signature was not in the hand writing of the testator, and it was also proved that neither of the subscribing witnesses was at the house of the deceased on the day the will impeached bore date, and a letter was produced written at the instance of one of the witnesses, dated the 4th November, in which it was stated that the deceased had not then made any arrangements about his affairs. And

four other witnesses also proved that the deceased had made statements after the date of the alleged will, from time to time, up to the time of his death, to the effect that he had made no will and had not settled his affairs. One of the subscribing witnesses, although duly subpoenaed by the plaintiff, attended and was at the Court House on the day of the trial, but subsequently absented himself before he could be examined as a witness in the action; and an opportunity was given by the Court to the defendants to produce the other subscribing witnesses for examination, which they did not avail themselves of.

Held, that a sufficient *prima facie* case had been made invalidating the will, and that the onus of establishing its validity was cast upon the defendants.

Morton for plaintiff.

Sol. White, for defendant.

Boyd, C.]

[Jan. 12.]

GRIP PUBLISHING CO. v. BUTTERFIELD.

Patent—Patent for improvement—Infringement—Injunction—Combination—Non user of one of the parts of a combination.

Where there is an original invention and an improvement is made upon it, a patent may be taken out for the improvement, and then, by getting a licence from the patentee of the original invention, the inventor of the improvement may work the whole process.

But a valid patent cannot be obtained for an improvement which is in fact merely one of the several modes in which the invention may be carried out, although one not actually mentioned in the original patent.

A patentable improvement must be something in addition to the first invention and not merely a description of a better mode of applying the first invention.

Thus where the plaintiff had obtained a patent for a counter check book with "a black leaf bound in with the other leaves but next to the cover," and the defendant then patented improvements consisting of (a) the attaching of the black leaf to a membrane, and (b) the binding of the leaves of the book together by an elastic band,—(c) and also in his specifications described the black leaf as bound "between the lower leaf and lower cover."

Held, that the defendant was not justified in

using with his alleged improvements, *a* and *b*, the alleged improvement *c*, which was a mere description of another mode of applying the first invention, and that the plaintiff was entitled to a perpetual injunction restraining him from so doing.

Held also, that the omission by the plaintiff of an immaterial element in his invention from the articles manufactured under his patent, did not affect his right to an injunction as against the defendant.

W. Cassels, for plaintiff.

Moss, Q.C., and *Kingsford*, for defendant.

Ferguson, J.]

[Jan. 15.]

GREEN V. WATSON.

Patent right—Sale of right to territory—Covenant to warranty and defend—Breach.

The plaintiffs covenanted with the defendants that B. would warrant and defend them in the manufacture of a patented machine within certain territory, in which they granted them the exclusive right to manufacture it, and that if B. neglected to protect and defend, then the royalty should cease. And defendants covenanted to pay a royalty therefore so long as they continued to manufacture.

Held, that the plaintiffs had not bound themselves that B. should prosecute with success all who infringed on the patent within the territory, but that he should protect them against all having a right to manufacture who should do so within the territory.

Held, also, that on breach of the plaintiff's covenant, the defendants might continue to manufacture without paying the royalty.

Morphy and *Cassels*, for plaintiff.

Bethune, Q.C., and *Barwick*, for defendants.

Ferguson, J.]

[Jan. 15.]

EMERY V. EMERY.

Alimony—Separation—Wife's neglect to return.

A wife who owned the house in which she lived with her husband, ordered him to leave it with threats of violence, and they lived separate for some years, the husband going to the United States of America, and becoming domiciled there. The wife knew of the husband's place of residence in the States, but did not offer to go to him.

Held, that she was not entitled to alimony. Where evidence might have been given at the trial, but was withheld by defendant's counsel, the Court refused a subsequent petition for leave to offer the same.

J. H. Ferguson, for plaintiff.

W. Cassels, for defendant.

Ferguson, J.]

[Jan. 15.]

HARPER V. CULBERT.

Mortgagor—Mortgagee—Power of sale—Execution creditor—Fraudulent conveyance—ChamPERTY—Maintenance.

The defendant Culbert, being mortgagee of of certain lands under a mortgage made by one E. J. Jackson in March, 1880, sold the lands under a power of sale, and realized more than sufficient to pay the mortgage debt.

The plaintiff's assignors, on 2nd May, 1879, had placed an execution against the mortgagor's lands in the hands of the sheriff, issued on a judgment recovered against the mortgagor.

On 28th November, 1878, however, the mortgagor had conveyed the equity of redemption to one Irwin, who, on 17 February, 1879, had conveyed it to the mortgagor's wife, Isabella Jackson; both these conveyances were voluntary.

On 1st March, 1879, one Mitchell recovered a judgment against E. J. Jackson and one Glennie, on a promissory note made by Jackson and endorsed by Glennie. On 9th September, 1879, Glennie paid the judgment and took an assignment thereof. Glennie then commenced a suit to set aside the conveyances to Irwin and Isabella Jackson as fraudulent, as against the creditors of E. J. Jackson.

Both the plaintiff's assignor and Glennie were served with notice of the exercise of the power of sale. The plaintiff's assignor paid no attention to it, nor did the plaintiff or his assignor make any claim to the surplus until after it had been paid over, but Glennie agreed to discontinue the suit to set aside the conveyances, on receiving from Isabella Jackson her consent or order authorising Culbert to pay his claims out of the surplus. This order or consent was given and the claims paid.

Held, that although the conveyances whereby the equity of redemption was vested in Isabella Jackson might be voidable for fraud, yet until they were declared void the mortgagee was en-

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titled to treat them as valid, and to apply the surplus accordingly.

Held also, that the plaintiff was entitled to no relief, either as against Culbert or Glennie, in respect of the moneys paid to Glennie.

Held also, that an absolute assignment of a *chose in action*, for less than its apparent value, is not open to objection on the ground of its savouring of champerty or maintenance, because the assignee thereby acquires the right to attack a transaction by the debtor as being fraudulent.

J. MacLennan, Q.C., for the plaintiff.

J. Bethune, Q.C., for the defendant.

Ferguson, J.]

Jan. 15.

SIMPSON V. CORBETT.

Administration—Account—Illegitimacy—Escheat—Grantee of crown—Provincial Government—Executor—Trustee—Statute of Limitations—Parties.

C. M. died in 1869, entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. and E., and in the event of either dying, the share of the one dying was to go to the survivor. The defendant was appointed executor of the will and guardian of D. and E. who were infants. Both D. and E. died in 1871, D. having survived E. The defendant afterwards paid up a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagor to himself in fee.

The plaintiff on 24th July, 1880, procured a grant from the Crown under the great seal of the Province of Ontario, of the real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on the 20th Oct., 1880, procured letters of administration to D.'s estate.

Held, that the plaintiff as such administrator was entitled to an account of the defendant's dealings with the real and personal estate of C. M.

Held, also, that although the original mortgagee might, in the events which happened, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiff, and that he was trustee thereof for the plaintiff.

Held, also, that notwithstanding *Attorney-General v. Mercer*, 5 S. C. R. 538, the plaintiff's right to an account as administrator of D.'s estate, was not affected by the alleged invalidity of the grant to him of the escheated estate.

Held, also, that the Statute of Limitations was no bar to the action.

Held, also, that neither the *cestui que trust* named in the grant from the Crown, nor the Attorney-General for the Dominion, were necessary parties

MacLennan, Q.C., for the plaintiffs.

Bethune, Q.C., for the defendants.

Boyd, C.]

[Jan. 23, 24.

KITCHING V. HICKS.

Interlocutory injunction—Conflicting decisions.

Upon a motion for an interlocutory injunction restraining the payment of money, until the trial, it appeared that there was a decision affecting the legal question involved, in favour of the plaintiff, which was at variance with the *dicta* contained in a judgment given in an earlier case, which was not cited.

Held, that under the circumstances it was proper to grant an interlocutory injunction preserving the property *in medio* until the trial.

Whether an assignee for the benefit of creditors can successfully dispute a prior chattel mortgage on the ground of its not having been registered, *Quare*: see *Boynton v. Boyd*, 12 C. P. 334; *Re Coleman*, 36 U.C.Q.B. 559.

Jan. 23, 1883.

Hoyles, for plaintiff, moved to continue an injunction restraining defendant Clarkson from parting with \$800 of assets realized by him from the estate of his co-defendants, of which he is assignee for the benefit of creditors.

Akers, for defendant Clarkson, contended that the injunction should not be continued on the ground that the plaintiff claimed title to the property in question under an unregistered agreement in the nature of a chattel mortgage, which, he contended, was void as against the assignment to Clarkson. He referred to *Boynton v. Boyd*, 12 C. P. 334, and other cases.

Hoyles. — The assignee Clarkson has no *locus standi* to dispute the plaintiff's mortgage, which was valid between the parties, and could not be disputed by the assignee, who was not a purchaser for value. He relied on *Re Coleman*.

Prac. Cases.]

NOTES OF CANADIAN CASES.

[Prac. Cases.]

36 U. C. Q. B. 559; *Bank of Montreal v. McWhirter*, 17 C.P. 506. Judgment reserved.

January 24th.

BOYD, C. — In the present state of the law, the safest course to adopt on the present application is to continue the injunction until the hearing. It is evident that views of Draper, C.J., in *Boynton v. Boyd*, 12 C.P. 334, though not essential to the disposition of that case, are at variance with the views expressed in *Re Coleman*, 36 U. C. Q. B., in which the earlier case does not appear to have been cited. If it be that the *dicta* of Draper, C.J., are law, then the agreement to hold the goods as security in the case, not being registered would be invalid as against the subsequent assignment for the benefit of creditors. But if not, then in another aspect of the case which is not at present presented, it may be that the privilege claimed by the plaintiff cannot be enforced as against any of the creditors of Hicks intervening in that character, as I held in *Park v. St. George*. As against a voluntary assignee, it may be that the plaintiff can succeed; as against a creditor prejudiced by the unregistered agreement, it may be that the plaintiff will fail. But this aspect of the case is not at present before the Court, so that I content myself with holding the fund *in medio* that the rights of all parties may be better disposed of at the trial. Costs of this motion will be reserved till then.

Moss, Q.C., for the plaintiff.

Akers, for the defendant.

PRACTICE CASES.

Hagarty, C.J.]

[Sep. 15, 1882.]

IN RE PRESCOTT ELECTION PETITION.

Election petition—Presentation of.

Held, that under 37 Vict. ch. 10 (Can.), the filing of an election petition in the local registrar's office at L'Orignal was not a presentation within the requirements of the statute.

Bethune, Q.C., for the motion.

A. Cassels, contra.

Osler, J.]

Nov. 13, 1882.

RE SIMPSON AND THE JUDGE OF THE COUNTY COURT OF LANARK.

Voters' list—Notice—R. S. O. ch. 9. Sec. 9

A notice required by sec. 9 R. S. O. ch. 9, to be given by a voter or person entitled to be a

voter making a complaint of any error or omission in the voters' list should be subscribed to by the person complaining, or his agent.

The question of the validity of the notice may be raised on the hearing of the complaint.

Holman, for the motion (*ex-parte*).

Ferguson, J.]

[Nov. 23, 1882.]

RE COLTHART.

Dower—Lunatic—Infant—44 Vict. (O.) ch. 14, sec. 5.

The mother of an infant whose estate was being sold under the provisions of R. S. O. ch. 40, ss. 75–83, was a lunatic, and confined in the London Asylum.

FERGUSON, J., made an order under 44 Vict. ch. 14, sec. 5, barring the mother's dower.

*Hoyle*s, for the application.

Osler, J.]

[Jan. 18.]

MYERS V. KENDRICK.

Examination -- Judgment debtor -- Rule 366--369 O. J. A.

The plaintiff was nonsuited in the action, and the defendant recovered judgment against him for his costs of defence.

Held, that the plaintiff was not a judgment debtor within the meaning of Rule 366 O. J. A., or sec. 17 R. S. O. chap. 49, or sec. 304 R. S. O. cap. 50.

The defendant had obtained the usual appointment from an examiner, and served the plaintiff with a copy, together with a copy of a subpoena, at the same time exhibiting the original subpoena.

Held, that an original appointment, signed by the Judge or officer, must be served under Rule 369 O. J. A., on the person to be examined.

Held, also, that an examination of a judgment debtor under R. S. O. cap. 49, sec. 17, or under R. S. O. cap. 50, sec. 304, can only take place under a rule of Court, or Judge's order.

*Seem*le, the provisions of sec. 304, R. S. O. cap. 50, have been superseded by the O. J. A. and Rules.

Aylesworth, for motion.

Clement, contra.

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DIARY FOR FEBRUARY.

15. **Thurs.** Rehearing in Chancery begins.
17. **Sat.** . . . Hilary Sittings end. William Osgoode first C. J. of U. C., died 1824.
18. **Sun.** . . . *Second Sunday in Lent.* Maritime Court Act came into force, 1878.
20. **Tue.** . . . Supreme Court Session begins.
25. **Sun.** . . . *Third Sunday in Lent.*
27. **Tue.** . . . Sir John Colborne, administrator. 1838.
28. **Wed.** . . . Indian mutiny began, 1857.

TORONTO, FEB. 15, 1883.

WE recommence in our present number our current review of the cases reported in the *Law Reports*. As before, all decisions except those relating to the provisions of special English Acts, to which our statute books contain no similar enactment, will be noticed as soon as possible after they are issued, and the salient points and dicta of the judgments will be called attention to. Our object in this feature of our Journal, which so far as we know, is to be found in no other English or Canadian publication, is to enable our readers to keep track of the current English decisions in an easier and more effectual manner than can be done by attempting to assimilate a number of indigestible digests and headnotes. It is our intention, also, to resume and continue regularly our short reports of current English Practice Cases, illustrative of our Judicature Act and orders.

THE point which came before our Court of Appeal in *Allan v. McTavish*, 2 App. R. 278, was recently before the English Court of Appeal in *Sutton v. Sutton*, W. N. 1882, 172; and the latter Court, we see, has come to the opposite conclusion to that arrived at by our Court of Appeal. The English Court holding that an action on a covenant contained in a

mortgage of lands is barred, as well as the remedy against the lands, after the lapse of twelve years, by the Impl. Statute 37-38 Vict. c. 57, s. 8, which, except as to the period of limitation, is similar to R. S. O. c. 108, s. 23. In Ontario the Judge of first instance, (Morrison, J.) was of the same opinion as the English Court of Appeal, and was reversed. In England, the Judge of first instance (Chitty, J.), appears to have been of the same opinion as our Court of Appeal, and he was reversed.

WE publish elsewhere an able and important judgment by Judge Clark, holding that a judge has power in a Division Court suit to make an order to strike out a defence and enter judgment for plaintiff without a formal trial of the action. The learned judge will probably find that his decision will involve him in an unexpected amount of labour, though, as he says, the question of inconvenience is a matter of minor consideration. Other judges may not feel called upon, by reason of the great inconvenience that would attend such a practice, if for no other reason, to exercise their discretion under sect. 244 of D. C. Act, to the extent Judge Clark has done; but it is hard to see where his reasoning is at fault. A case is noted in R. & J. Digest, p. 1106, *In re Willing v. Elliott*, where Chief Justice Wilson is said to have held that the sections of the Administration of Justice Act, 1873, authorizing the examination of parties, does not apply to Division Courts; we can find no report of the case however. We are under the impression that it came up as an appeal from a judgment of Judge Toms. Perhaps some of our readers could furnish a report of the case.

EDITORIAL ITEMS.

The case of *McDougall v. Campbell*, 6 U. C. R. 502, has settled an important principle of law; and we think the decision in every way satisfactory. The short point in the case was this: the plaintiff being about to advance a sum of money on the mortgage of an estate, upon which the defendant had a prior mortgage, the defendant agreed to postpone his mortgage to the plaintiff's. The agreement was in writing, but the plaintiff omitted to register it. The defendant afterwards assigned his mortgage for value to an assignee, without notice of the agreement with the plaintiff, and consequently the plaintiff lost his priority. The question to be determined was whether the defendant, under those circumstances, was bound to indemnify the plaintiff or not. The Supreme Court, affirming the Court of Appeal for Ontario, held that he was. Strong, J., dissented, on the ground that the defendant was not bound to disclose to his assignee the agreement to postpone, and that the plaintiff had lost his priority through his own fault and by the operation of the Registry Law, for which the defendant was not responsible. It is, however, satisfactory in the interest of fair and honest dealing, that the majority of the Court felt able to discard this line of reasoning, and conform to the principle that a man cannot derogate from his own contract to the prejudice of another, even by keeping silence, when in common justice he ought to speak.

THE recent Masonic Lottery, in which, according to the manager thereof, as reported in the daily papers, was "consummated the grand act of the Masonic Temple's history," makes us feel a lively hope that the proper authorities will take measures to prevent the consummation of similar "grand acts" for the future. The recent lottery was a comparatively small affair, but it is the thin edge of the wedge, and the taste for such easy roads to wealth, like more legitimate forms of ambition, "grows by what it feeds on." Nothing can be more demoralizing to the people than

such public lotteries and the long list of lucky numbers, which appeared a few days ago in our daily papers, reminds one unpleasantly of what may be seen almost any day in the week in the morning papers in Spanish countries. The demoralization of the Spanish people may be attributed, to a great degree, at all events, to their passion for lotteries and other kinds of gambling; and if the recent Masonic Lottery was not illegal under Imp. 12 Geo. II. c. 28, which our Courts have held to be in force in this country (*Cronyn v. Widder*, 16 U. C. R. 356), or under our C. S. C., c. 95, it would be well to remove such a defect in our criminal law.

The first number of the *Law Reports* issued this year contains a full report of the address by the Lord Chancellor, on behalf of himself and the Judges of England, made to Her Majesty on receiving from her hands the key of the building containing the new Law Courts. The peroration of this address is so fine that we make no excuse for reproducing it here for the benefit of those of our readers who do not subscribe to the *Law Reports*, or whose notice it may have escaped. It was not included in the account of the Opening reproduced in our number for February 1st.

The Lord Chancellor concluded thus:—

"It was, indeed, fitting and worthy of your Majesty, that these Royal Courts should be dedicated to their future use by the Sovereign of these realms, whose noblest prerogatives are justice and mercy, and from whom all jurisdiction within the British dominions is derived. Your Majesty's Judges are deeply sensible of their own many shortcomings, and of their need of that assistance which they have constantly received from the Bar of England, and from the other members of the legal profession; but, encouraged by your Majesty's gracious approval, and having before them the examples of a long line of illustrious predecessors, they have endeavoured, and will always endeavour, to fulfil the great duties entrusted to them with fidelity to your Majesty, with zeal for the public service, with firmness, impartiality, in the fear of God,

RULES OF COURT—RESCISSION OF CONTRACT.

and without fear of man. That they and their successors may be enabled truly to do justice within these walls, so long so the British name shall endure; that the blessing of the Almighty may rest upon their labours; that the law which they administer may ever be a terror to evil-doers, and a strength and support to those who have right on their side; and that your Majesty may be preserved for many future years, still to shed fresh lustre upon a throne founded on law, sustained by justice, and established in the hearts of your Majesty's people, is the fervent prayer of all the Judges of your Majesty's Supreme Court of Judicature, for whom on this august occasion it has been my privilege to address your Majesty."

RULES OF COURT.

A valued correspondent draws our attention to the provisions of O. J. A. sec. 54, ss. 3, which appears to get over some of the difficulties suggested in our last number. It is possible, also, that the Interpretation Act, s. 8, ss. 33, to which our correspondent also refers, removes the doubt raised by us as to the necessity of all the Judges of the High Court concurring in the making of Rules for the High Court. If this be so, any doubt as to the validity of the Rules already passed would seem to be set at rest. The main objections to the present system, discussed in our previous remarks, can, however, hardly, we think, be disputed—namely: that the present Rule-making body, even though the minimum number be seven, as our correspondent avers, is too large: that there is a discordance of aim among its members, and a corresponding want of harmony of action in the body, as well as a difficulty in getting the necessary number of Judges together for a sufficient time, and a danger that crude suggestions may be formulated into Rules without sufficient consideration. Moreover, that when Rules are passed, it seems to be nobody's business to see that they are published speedily in an authentic form for the information of those for whose guidance they are framed. We

believe Rules passed in the beginning of January have not yet been published officially.

These objections and difficulties, we are sure, no one can be more anxious to see removed than the learned Judges themselves.

RESCISSION OF CONTRACT.

Two cases in which the same principle of law was involved appear to have been recently decided; the one by the English Court of Appeal, *Mersey Steel and Iron Co. v. Naylor*, 47 L. T. 369, and the other by the Q. B. Division of Ontario, *Midland Ry. Co. v. Ontario Rolling Mills Co.*, 19 C. L. J. 31. In both cases the question at issue was whether a wrongful refusal to pay, pursuant to a contract, for part of the goods delivered thereunder, amounted to a rescission or renunciation of the contract, or whether the party refusing to pay, could nevertheless recover damages for breach of contract for the non-delivery of the remainder of the goods. In the English case the Master of the Rolls declared that there is no absolute rule which can be laid down in express terms as to whether a breach of contract on the one side, has exonerated the other from performance of his part of the contract. It is stated in *Freeth v. Burr*, L. R. 9 C. P. 208, 29 L. T. N. S. 773, that the question in such cases must turn on "whether the acts and conduct of the party evince an intention no longer to be bound by the contract," and this statement of the law was cited with approbation by the Master of the Rolls. In the English case the refusal to pay was based on a mistake in law as to the legal right of the plaintiff company to receive the money—a petition for its winding up having been presented. In the Ontario case the refusal to pay was caused by a mistake of fact, as to the delivery of part of the goods for which payment was claimed. And in both cases, it was held that the refusal to pay under the circumstances was no abandonment of the contract; and in both these cases which were brought to recover the price of the goods actually delivered,

PROFESSIONAL INVADERS—HUMOROUS PHASES OF THE LAW.

a counter claim for damages for non-delivery of the remainder of the goods was sustained.

In *Honck v. Muller*, 7 Q. B. D. 92, 45 L. T. 202, Lord Bramwell appears to have considered that in no case where the contract had been partly performed, could one party rely on the refusal of the other to go on, as amounting to a renunciation of the contract. But the Court of Appeal, we see, repudiated the idea that any different rule is applicable whether the contract be performed in part or not performed at all.

We may add that the Court of Appeal, in arriving at the decision they did, were compelled to admit that it was impossible to reconcile the earlier cases on the point, referring more particularly to *Hoare v. Rennie*, 5 H. & N. 19; *Simpson v. Crippin*, L. R. 8 Q. B. 13; 37 L. T. N. S. 546; and *Honck v. Muller*, 7 Q. B. D. 91; 45 L. J. 202.

PROFESSIONAL INVADERS.

WE refer again to this subject, which is indeed a burning question amongst country practitioners, for the purpose of urging upon the Judges not to appoint commissioners for taking affidavits so freely as is done.

We believe that one remedy for the profession will be found there. The practice for some time has been that every one of these unlicensed practitioners who competes with the lawyer in his own town or village, obtains a commission just upon asking the County Judge to give a certificate that the public needs require it. It is said that these certificates are often given thoughtlessly.

But the discretion in granting the commissions is that of the Superior Court Judges, and they have no right to delegate it to others. If they wish to be informed on the subject, let them enquire as well of the Bar in the County as of the County Judges, and let those whose duty as well as right it is, take some pains to be fully informed. It is hard that they should be

called upon to spend their time in this. But they can depute the officers of the Courts to make enquiries, and then act on the information. The profession have rights and they should be protected, and they naturally call upon the Judges to do their part. The number of Lawyers in the country is now so great that there is no practical inconvenience in limiting commissions to them and to Clerks of Division Courts. The Benchers have discussed the matter again and again, and we have dozens of times exposed the iniquity of the present system. As for legislation in this matter, of course it is hopeless to get any Local Legislature to see that there is a grievance when so many of our legislators earn an honest (or the reverse) penny by conveyancing. Of course these hedge conveyancers put a good deal of work in our way by their ignorance, but that, certainly, is not the reason why the Judges in effect, but, of course, most unintentionally, play into their hands. Refuse commissions except to officers of the Court, save for very special reasons, and the grievance will be to some considerable extent remedied.

HUMOROUS PHASES OF THE LAW.

WE are told on good authority that the Reports of the American Courts are being issued at the rate of about two volumes a week. With this one appalling fact in our minds, we are not surprised that a person, of Mr. Browne's keen observation of anything and everything containing ought of humor in its composition, has been able, since the appearance of the first edition of his "Humorous Phases of the Law,"* in 1876, to glean enough amid the decisions of the Courts to add very materially to most of the topics of which he so pleasantly treated. Besides, he has not been content with the vast field that lies before him shadowed by the patriotic wings of

Humorous Phases of the Law. By Irving Browne, editor of the *Albany Law Journal*, author of "Short Studies of Great Lawyers," new edition, revised and enlarged. Sumner Whitney & Co., 1882.

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the great American Eagle, but has prowled around with editorial scissors and an expansive note-book into the Courts of our Dominion, both East and West, into the sacred precincts of Westminster Hall, the Four Courts of Dublin, the Parliament House of Edinburgh, among the judges and advocates of old Europe, and even leaps half way across the Pacific and quotes the learned deliverances of the Supreme Court of the Hawaiian Islands.

We greet the arrival of this new edition, "revised and enlarged," with even greater pleasure than we did the first. The bulk of the book is more than doubled, while the gravity is not increased one whit; although it deals extensively with such serious subjects as "Sunday," and "the Clergy." "Law," through a very proper maid, is by no means always dull; though never naughty, she is often nice. She is, in fact, chameleon-like, and depends much upon what she is near. Mr. Browne often finds her with a smile on her face, a humorous twinkle in her eye, a witticism upon her lips; when he does, he seizes the bright look or word with pen or pencil; thus he finds waiting upon her a pleasure and a profit, but no penance. He knows full well how to write a law book that will both instruct and entertain. He is able to make "the dry bones of our science sparkle with phosphorescent light at night."

This new volume forms another of the "Legal Recreations" published by Sumner Whitney and Company, of San Francisco. This series has been coming out far too slowly for the last half dozen years.

The new chapters treat of such interesting subjects as "Newspaper Law," "Practical Tests in Evidence," "De Minimis," and "Limitations of the Privileges of the Clergy;" while much has been added to such topics as "Negligence," "Nuisance," "Animals," "Sundays," "Wagers," and "Trade-marks." Let us first steal some of the honey which the busy B. has gathered through the days that have passed since 1876, and stored in this

book, and then dive into his other treasures that he now first opens up to the general reader. We say general reader, for here we find much that has already interested, amused or instructed the professional in the pages of the *Albany Law Journal* (of which since September, 1879, our author has been the able and indefatigable editor); and this is a book in which any reader of intelligence, be his profession or calling what it may, will find much to interest and profit.

Christianity is part of the law of our land, so we will glance first at the new things he gives upon "The Law of Sunday." Visitors to the New England States will find it well to remember that down East one must not travel on the Sabbath to pay a visit of pleasure to a friend, nor to sell pigs, nor to swap jewelry; nor can one call on a friend in coming back from a funeral in order to be cheered up. If one does any of these things, and meets with an accident, he is remediless: (*Cratty v. Bangor*, 57 Me. 423; *Bradley v. Rea*, 103 Mass. 188; *Myers v. Meinrath*, 101 Mass. 366; *Davis v. Somerville*, 128 Mass. 594). On the other hand, if you hire a horse on the Lord's-day and injure him, you will not have to pay the owner, provided you were driving for pleasure; it will be far otherwise if the horse was hired for any work of necessity or charity: (*Parkers v. Latner*, 60 Me. 528; *Doyle v. Lynn, &c., Ry.*, 118 Mass. 195). If one is hurt solely by a defect in the streets while walking in the City of Portland, after drinking a glass of beer in a beer shop, he may recover damages from the city: (*O'Connell v. Lewiston*, 16 Me. 34). We thought there was no beer to be had in beer-shops in the home of the Maine Liquor Law! Although the moral and divine song says, "Let dogs delight to bark and bite," they must not do the latter to human bipeds on the Sabbath; it is neither a work of necessity nor charity. And in Iowa they must not bark and frighten the horses of one who is breaking the law by driving on business on that day: (*White v. Lang*, 120 Mass. 598;

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Schmid v. Humphrey, 48 Ia. 652). The case of the Scotch doctor's boy and his master's gig, to which we referred at p. 192 of our last volume, is given at considerable length. We learn that in Indiana it is wicked to take up a subscription for a religious purpose on Sunday, yet it is no harm to feed pigs, to cut ripe grain, to market ripe melons, to sell cigars at a hotel: (*Catlett v. Trustees*, 62 Ind. 365; *Edgerton v. State*, 67 Ind. 588; *Wilkins v. State*, 59 Ind. 416; *Carver v. State*, 69 Ind. 61). We think that the Court must have been particularly impecunious when it decided the first of these cases, and we find that in Michigan and Pennsylvania the judges were not quite so strict as to money transactions of that kind on Sunday: (*Allen v. Duffie*, 43 Mich. 1; *Dale v. Knapp*, 24 Alb. L. J. 432). Sunday shaving is dealt with at length, and our own case of *Reg. v. Taylor* referred to, but only in a foot note, such unimportant personages are we poor Canadians. While we are on religious topics, let us see what our author has to say on the privileges of the clergy. We will assume, and, of course, rightly, that our readers know all the English cases; such as the case of the parish school-master, who, like daddy long-legs, would not say his prayers, (no, we mean would not teach in Sunday-school), and was, consequently, thrown, not down stairs, but out of employment; and the case of Wesleyan architect, who was accused of having no religious acquaintance with the work of restoring churches: (*Gilpin v. Fowler*, 9 Exch. 615; *Botherhill v. Whytehead*, 41 L. T. (N.S.) 588); where both master and architect taught their clerical opponents, by actions of damages, to be somewhat more *suaviter in modo*. Mr. Browne gives us a case where the Rev. Mr. Bennett wrote to a lady who had belonged to his choir, making uncomplimentary remarks about Count Joannes (born simple George Jones), who wished to marry the fair singer. The Count sued the parson, the jury mulcted him in damages, and the Court said the marriage was none of his business.

Mrs. Farnsworth was not so successful against the minister who "read her out of church," according to custom: (*Joannes v. Bennett*, 5 Alb. L. J. 169; *Farnsworth v. Storrs*, 5 Cush. 412). A priest has a right to keep order in his church, even though the disorder has arisen from the personal nature of some of the remarks in his sermon, but he has no right to forcibly eject a person lawfully in a sick room in which he is about to administer the sacrament of extreme unction to a dying man: (*Wall v. Lee*, 34 N. Y. 141; *Cooper v. McKenna*, 124 Mass. 284). We find the rule laid down that a clergyman cannot receive a pecuniary benefit from a parishioner, unless he shows the utmost good faith on his part, and freedom of action on the part of the donor. And this, although the Court said in one case, truly enough, "in this country the danger is that clergymen will receive too little rather than too much." A priest cannot safely advise his hearers "to tie a kettle to the tail" of an obnoxious parishioner; and, as we know in this Dominion, if he warmly espouses the cause of a parliamentary candidate, and refuses the sacrament to those who propose to vote for his opponent, the election will be set aside on the ground of undue influence and intimidation: (*McGrath v. Finn*, Irish C. P. 1877; *Maise v. Robillard*, 4 Can. Leg. News, 10). Mr. Browne does not think that a priest may properly tell his people from the pulpit how they should vote.

Under the law of "Necessaries" we find that in Montreal an £80 ball dress is not a necessary for a poor wife; an infant's board is a necessity, but not so with timber to repair his house: (*Sharply v. Doutré*, 4 Can. Leg. News, 185; *Bradley v. Pratt*, 23 Vt. 378; *Freeman v. Bridger*, 4 Jones, L. 1). Dentistry is necessary for an infant, and so are spurs, and sleeve-links, and a horse, and a pony: (*Strong v. Foote*, 42 Conn. 61; *Hill v. Arpon*, 34 L. T. (N.S.) 125; *Ryder v. Wombwell*, L. R. 3 Exch. 90; *Hart v. Brater*, 1 Jur. 623; *Miller v. Smith*, 20 Minn. 248).

Among "Wagers" we have the case of

HUMOROUS PHASES OF THE LAW—RECENT ENGLISH DECISIONS.

John Hampden, who seems to have been as obstinate and opinionated as the celebrated ship-money patriot of the same name, and who deposited £500, and defied all the philosophers, divines and scientific professors in the United Kingdom to prove the rotundity and revolution of the world from Scripture, from reason, or from fact: (*Hampden v. Walsh*, L. R. 1 Q. B. D. 189).

Our author is evidently a lover of natural history, and plays his trump cards when he treats of "The Animal Kingdom in Court." In this chapter a whole Noah's ark full of quadrupeds, bipeds, no-legged animals, pass in review, and we are introduced to the views of the Courts on dogs and bulls, cats and cocks, rams and hogs, doves and deer, turkeys and oysters, pigeons and mice, whales and elephants. Dogs have their rights, as we are told by a Vermont judge, and the rights of the one in question, "the most wickedest kind of a dog," was to be hanged on the first notice. The same judge tells us that in estimating the amount of damages accruing from the bite of a dog, the solicitude and fear of hydrophobia is a proper matter for consideration: (*Godeau v. Blood*, 52 Vt. 251). Dogs, we are told, have done more mischief than any other domestic animal, and their cases have been oftener before the Court. Dog's bites are sometimes expensive affairs for their owners. The McKessons owned a Siberian blood-hound; a bite or two of his on the person of their watchman cost them \$1500, not to speak of costs. Dodge's dog bit a child who was playing with Dodge's whip, and Dodge had to pay \$250: (*Muller v. McKesson*, 10 Hun. 44; *Meibus v. Dodge*, 38 Wis. 200). Where a boy, inspired perchance by the martial lay of Horatius, stood upon a narrow bridge, and barred the way against a dog, and smote the canine upon the back, it was held that the dog's owner was responsible for the bite that followed. A lady with some meat in her satchel, said to a dog, "Doggie, ain't you going to let me out?" The animal bit her

and the owners had to pay damages. This seems hard, as perchance it was sausages the lady had, and the law allows an assault by a parent in defence of offspring. And so where another lady offered candy to a vicious dog on the street, and the animal sprang at her, and bit her. What if this was another instance of the Garuda stone, and the dog was Mr. Bultitude, of "*Vice Versa*," and the candy was peppermint: (*Plumley v. Birge*, 124 Mass. 57; *Learles v. Ladd*, 123 Mass. 380; *Lynch v. McNally* 73 N.Y. 347).

Many are the bulls referred to—not Irish bulls, but the bucolic fathers of the herd. *Crawford v. Williams*, 48 Iowa, 247, was an action of damages for seduction by a bull, and doubtless its trial drew a crowded audience. In another case, where the killing of a buffalo bull was defended on the ground of its being an animal *ferie nature*, the Court in giving judgment, spoke of a Mrs. Gibson, who, instead of running away as others had done when the bull came towards her, "just flapped her apron at him, and said shoo;" the bull turned and ran away in great alarm, never stopping, but ran clean away. Of this case our author says: "This circumstance shows that in punishing Eve's transgressions the Lord was not unmindful of the increased danger which the infection of her sin subjected her to from the brute creation; for what would a fig leaf have availed in such an exigency?" If we have any fault to find with our author, it is that his sense of the humorous occasionally induces him to show too great a knowledge of the Holy Scriptures. Perhaps, however, that is the tendency of the age and country.

But to continue our inspection of the animal kingdom. We have the case of an Irish bull rushing into a house, knocking down the mistress, and entering the kitchen; then comes the "Sacred ox," with its nasty smell, frightening horses, etc.: (*Cote v. Newburyport*, 129 Mass. 594); and we have two cinnamon coloured bears exhibiting on the street: (*Little v. Madison*, 42 Wis. 643). A

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cat figures in *Webb v. McFeat* (22 Journ. of Jur. 669), for killing a carrier pigeon. The pursuer (not the cat, but the plaintiff), claimed that the defender was responsible in respect of the natural disposition or propensity of cats to kill birds, and the defender's failure to keep the animal properly enclosed or secured. The Court considered that the owner of the bird should have exercised as much caution to prevent it coming near the cat as the owner of the cat should have done to keep it from the bird; that as the victor and vanquished met on neutral ground, both owners were in equal blame.

George Mathews wrongfully and negligently kept a savage and dangerous cock-fowl, knowing it to be savage and dangerous, and accustomed to injure mankind, whereby one Florence Walford was pecked and injured, and George Mathews was asked to pay £5 damages; but the Court said £1 was sufficient compensation, and 16 shillings to pay the doctor. "A town is liable for the injury that a town ram does by abutting on one of the town folk: (*Moulton v. Learborough*, 71 Me. 257). It seems that in England one is not legally liable if his pigeon alight upon a neighbour's roof and pick out the mortar between the slates and tiles, thereby loosening the same, and letting in wet. The owner of the house may kill them, that is all: (*Hannan v. Mackett*, 5 B. & C. 939).

One reads *State v. Mary Turner*, 66 (N.C. 618) with saddened feelings about Christmas time, because Mary was indicted for stealing one turkey of the value of five cents! The Court held that turkeys were not *feræ naturæ*. But coons are. Freshly imported parrots are not domestic animals: (*Warren v. State*, 1 Greene, 106; *Swan v. Saunders*, 44 L. T. (N.S.) 424). The Courts know something about oysters. We are told that like domestic animals, they continue perpetually in the owner's occupation, and will not stray from his home or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed or made tame by art, industry, or education.

(Fancy an educated oyster.) If at liberty they have neither the inclination nor the power to escape. They are obviously more nearly assimilated to tame animals than to wild ones; and perhaps more nearly to inanimate objects than to animals of either description. This Court takes them merely in the shell, will have nothing to do with soup, stew or patties, it says, "dead oysters are of no value." Another legal sage says, "Oysters have not the power of locomotion any more than inanimate things:" (*State v. Taylor*, 3 Dutch, 117; *Fleet v. Hagermen*, 14 Wend. 42). Space would fail were we to attempt to follow our author among dogs and carrier pigeons, bees and elephants, parrots and whales. We can only add that when *Thurman v. Bertram* was tried by Baron Pollock, an elephant was brought into Court; and ladies may joy in the fact that it is no crime to steal a tame mouse.

(To be continued.)

RECENT ENGLISH DECISIONS.

In recommending to review the current English decisions contained in the *Law Reports*, it seems best to begin with the January numbers, rather than attempt the task of going through the numbers which have been missed in the course of the recent period, during which our articles on this subject have been unavoidably discontinued.

The January numbers of the *Law Reports* consist of 10 Q. B. D, pp. 1-58; and 22 Ch. D. pp. 1-131.

The former of these commences with a brief memorandum of the opening of the Royal Courts of Justice, and contains the address of the Lord Chancellor and the Judges to the Queen. We re-produce in the form of an editorial, in our present number, the exceedingly fine peroration with which this address concluded.

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TRESPASS—HIGHWAY—NEGLIGENCE—ONUS.

The first case requiring notice here is *Tillett v. Ward*, p. 17. In this case the plaintiff sued the defendant for damages, for that the defendant's ox, which was being driven by the defendant's servants through the streets of a country town, entered the plaintiff's shop which adjoined the street, through an open doorway, and damaged his goods, and the law governing the subject is thus stated by Stephen, J.:—"As I understand the law, when a man has placed his cattle in a field, it is his duty to keep them from trespassing on the land of his neighbours; but while he is driving them upon a highway, he is not responsible, without proof of negligence on his part, for any injury they may do upon the highway, for they cannot then be said to be trespassing. The case of *Goodwyn v. Chevaley*, 28 L. J. (Ex.) 298, seems to me to establish a further exception, that the owner of the cattle is not responsible, without negligence, when the injury is done to property adjoining the highway, an exception which is absolutely necessary for the conduct of the common affairs of life. In this case no negligence on the part of the drivers of the ox was shown, and the Divisional Court gave judgment for the defendant.

BILL OF EXCHANGE—MARGINAL FIGURES.

Passing by a bankruptcy case, the next one requiring notice is *Garrard v. Lewis*, p. 30, in which the question of the exact import and effect of marginal figures at the head of a bill of exchange, came before Bowen, L.J. The bill of exchange in question had been drawn by one Bees, four months after date, on the defendant; at the time when the defendant appended his signature to the document the sum to be mentioned in the body of the bill was left in blank, but in the margin of the bill were the figures £14 os. 6d., which was the sum for which the defendant desired to accept. Bees subsequently filled in the blank in the body of the bill for £164 os. 6d., and fraudulently altered the figures in the margin to that sum. Having done so, he indorsed

the bill to the plaintiffs, who took it as *bona fide* holders for value for the larger amount. The plaintiff now sued the acceptor on the bill for £164 os. 6d. The defendant pleaded that the bill after issue was altered in a material part. Bowen, L.J., in his judgment reviews the history of marginal figures in bills of exchange, and comes to the following conclusion:—"I arrive at the conclusion that a man who gives his acceptance in blank holds out the person to whom it is entrusted as clothed with ostensible authority to fill in the bill as he pleases within the limits of the stamp, and that no alteration, even if it be fraudulent and unauthorized, of the marginal figure, vitiates the bill as a bill for the full amount inserted in the body, when the bill reaches the hands of a holder who is unaware that the marginal index has been improperly altered."

PRACTICE—PRODUCTION OF DOCUMENTS.

In the next case, *Kearsley v. Philips*, p. 36, the action was for the seizure of the goods of the plaintiff on certain premises, and was brought against two defendants P. and D. The defendants were mortgagees, and justified under an alleged right of distress on the premises, and the plaintiff now sought to render them liable for such seizure. It appeared that since the distress, D. ceased to be a trustee, and thereupon B. was appointed a trustee in his place, and the mortgage was transferred from P. and D. to P. and B. In his affidavit of documents, the defendant P. stated that he and B. jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and B. to the premises as mortgagees thereof, and that he, P., objected to produce. On appeal, the Divisional Court, after reviewing numerous cases, now held that such affidavit showed sufficient reason for not making an order for inspection of the documents, citing as decisive, *Murray v. Walters*, Cr. and Ph. 114. Stephens, J., puts the matter thus:—

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"Here the documents, of which production is sought, are in the joint power and possession of two persons, one of whom is not before the Court, and cannot be made a party to the action; they are the title-deeds of a man who is not and cannot be brought before the Court. The application is that one man should be compelled to produce another man's title-deeds, because he has joint possession of them; an application which I should be very reluctant to grant unless bound by authority to do so."

DIVISIBILITY OF COVENANT TO PAY RENT.

The last case to be noticed in this number is *The Mayor of Swansea v. Thomas*, p. 48. The head-note states the facts very clearly. The defendant, being tenant of land under lease for years granted by the plaintiffs, and containing the usual's lessee's covenant to pay rent, assigned all her interest in the term. Subsequently the plaintiffs granted their reversion in part of the demised premises. No rent having been paid by the assignees of the defendant, the plaintiffs sued her for arrears of rent accrued due since the grant of their reversion in part of the premises, the sum claimed being a fair apportionment of the rent in respect of the other part, the reversion of which remained in the plaintiffs. Pollock, B., held that the covenant to pay rent was divisible; that the rent could be apportioned, although the action was founded on a privity of contract only; and therefore the plaintiffs were entitled to recover. The following extract from his judgment shows the reasoning by which he arrived at this result: "At common law, before the statute 32 Hen. VIII. c. 34, it is clear that, notwithstanding the assignment of the plaintiffs of their reversion in part of the premises, and notwithstanding any number of assignments by the lessee or his assignee, the plaintiffs might have sued the lessee or his executrix for the breach in question. The effect of that statute is to give to the assignee of the reversion the same right of suing the lessee and his execu-

trix as the original reversioner had. And it has been held that the statute transfers to the assignee the privity of contract, and further, that the covenant is divisible, so that the assignee of the reversion in part may sue upon the covenant in respect of his interest in that part: see *Twynam v. Pickard*, 2 B. & Ald. 105. If, therefore, the reversioner can assign the reversion of part of the premises to A., and of the residue to B., and A. and B. can both sue in respect of their respective interests, there seems no good reason why, if the reversioner assigns the reversion of part of the premises to A., and reserves to himself the reversion in the residue, he should not be allowed to sue in respect of his interest in the residue."

MORTGAGE—"ASSIGNS."

In 22 Ch. D. pp. 1-131, the first case is *In re Watts, Smith v. Watts*. In this case W. the owner and occupier of a public-house, gave to H. and Co., brewers, a mortgage to secure £1,300, and also all sums which should at any time be owing to them from "W., his executors, administrators or assigns on any account whatsoever." W. died, giving by will, all his property to his wife for life. Letters of administration, with the will annexed, were granted to the widow, who carried on the business. H. and Co. having sold under the power of sale in the mortgage, now claimed to retain out of the purchase money, not only the £1,300, still owing and unpaid, but also a sum of £138 for beer supplied to the widow, after the death of W., claiming that they were entitled so to do under the mortgage. Counsel for H. & Co. admitted that if "executors or administrators" had been mentioned, they might be taken as referring only to a debt contracted by W., but which, owing to his death, had become due from his executors or administrators; but, they urged, the word "assigns" could not be so explained. The Court of Appeal now, in accordance with this view, held H. & Co. were entitled to retain the

RECENT ENGLISH DECISIONS—JUDICIAL DIFFUSENESS.

£138 as claimed, Jessel, M. R., says:—"In opposition to this, the respondents urge that the word 'assigns' is a large word in law, and would include a tenant, or, as in this case, a devisee for life, and that it is not improbable that they were intended. The answer is, very likely not. The parties to the deed probably did not think of these exceptional cases, but only of an assign out and out; and taking the word in that sense, the curious clause which I am about to mention is quite rational. The difficulty in the way of the respondents, is to find anything in the deed authorising us to put a restricted meaning on the word 'assigns.' . . . What the parties meant was that the owner of the public-house for the time being should not be entitled to redeem the public-house without paying for the beer supplied to the owners for the time being. Unless we read the clause in this way, the word 'assigns' is virtually struck out, and following the rules that we are to give some effect to all the words used, if any reasonable meaning can be attributed to them, and also following the rule that we are to construe them with regard to what is usually expected to happen. I think the right reading is that the property is pledged for the debt of the assign to H. & Co., as well as what was due to them from Watts. If that is so, then as there is no doubt that the widow was the assign in law, the brewer had a right to say, 'By contract this house is pledged to us for the beer supplied to the widow as assign.'"

COSTS OF MORTGAGEE.

This case also illustrates the following rule as to the costs of mortgagees, in the language of the M. R., p. 12: "If a mortgagee brings in his account, and under a wrong impression of the law, but *bona fide* and honestly, makes a claim which cannot be supported and is disallowed, he does not pay the costs; and even if the brewers had failed, I should have held them entitled to their costs in the court below. Under the present

circumstances, of course they are entitled to their costs both here and below.

The remaining cases in this number will be noticed in the next issue of this journal.

A. H. F. L.

JUDICIAL DIFFUSENESS.

OBITER DICTA.

THE following remarks taken from the *Law Times* (England) of Dec. 16th ult., are not without application nearer home:—

"Public attention cannot be too often or too pointedly drawn to the serious consequences which may, and often do, result from the too diffuse judgments of learned judges. How frequently does one hear, when the words of some learned judge are cited, that it was 'only a dictum,' or was not necessary for the judgment,' and, therefore, is not to be regarded as binding, or to be taken into consideration in deciding the question at issue. A very remarkable instance of this has lately occurred. In the case of *Bradley v. Baylis*, 8 Q. B. Div. at p. 236), Lord Justice Brett is reported to have said:— 'But supposing during the qualifying year one of those lodgers leaves, and the owner thereupon (as he assuredly must) resumes the control over that unlet part; according to my view of the statutes, immediately by that act of his those people left in the house, who have been householders, become lodgers again.' The question for decision in that case was whether or not the appellant 'separately occupied a part of a dwelling house' within the meaning of the Parliamentary and Registration Act, 1878, and the Representation of the People Act, 1867, so as to entitle him to a vote. The case did not raise the point referred to by Lord Justice Brett in his judgment. During the recent revisions of the lists of voters, considerable stress has been laid upon the judgment of Lord Justice Brett, and many objections have been made to the claims of occupiers on the grounds that during the qualifying year in consequence of some one room becoming vacant, the landlord has exercised such a control over the house as is referred to by the Lord Justice in his judgment. In one instance, the objectors, not satisfied with the decision of the revising barrister, appealed to the

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court above (*Ancketell v. Baylis*, Dec. 1), with the result that the objection was overruled, and the Court held that the part of the judgment of Lord Justice Brett, which was relied upon, was not binding upon them, as it was not necessary for the decision of the question before the Court of Appeal. Similar instances might be indefinitely multiplied, all arising from what we venture to think is a great mistake, namely, too great diffuseness on the part of learned judges in delivering their judgments. Whatever appears in a reported judgment of a learned judge is certain to be adopted and acted upon sooner or later, and it is a result which can only be deprecated and deplored when action is taken upon dicta to which sufficient consideration and attention may not have been given, or which, in cases where more than one judge is sitting, would not have been indorsed by the majority of the court had they constituted an opinion on the essence of the case. So long, however, as judgments are delivered which deal with assumptions and facts outside those before the court for decision, so long will general complaint be made, and that not without great and sufficient reason."

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

DICKSON v. DICKSON.

Will—Construction—Restraint on alienation—Estate tail.

A testator, by his will, dated 25th June, 1866, devised to the plaintiff. "and his heirs," a parcel of land, subject to the following proviso: "that he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867.

Held, that the plaintiff was not entitled to an estate in fee simple, nor to a fee tail in possession, but that upon his death his children, who should survive him, would be entitled to an estate, either for life or in fee.

Semble, that the effect of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in

Motion for judgment. The action was brought to obtain a construction of the will of Joseph Hickson, who died in 1867. By his last will, dated 25th January, 1866, he devised to the plaintiff a parcel of land in the following terms: "I also give and bequeath to my son John Dickson (the plaintiff), to his heirs and executors forever, the following premises, namely: the south half of the farm, with the half of the dwelling house, and all the buildings presently on the farm; that is to say, the south half of the south half of Lot number 25, in the seventh Concession of the Township of York and County of York, and that, too, on the following conditions, namely, that he neither mortgage nor sell the place, but that it shall be to his children after his decease." It was admitted that the plaintiff had children living at the date of the will.

The action came on by way of motion for judgment on the pleadings.

J. Bethune, Q.C., and *J. Crickmore*, for the plaintiff. The effect of the will is to give the plaintiff an estate tail general, according to the rule in *Shelley's case*. The word children must be read as "issue of the body." The restraint on alienation is wholly void. *Gallinger v. Farlinger*, 6 C. P., 512; *Ware v. Cann*, 10 B. & C., 433; *Holmes v. Godson*, 8 D. M. & G. 152; 2 Jarm. 14.

T. S. Plumb, for the defendants, children of the plaintiff. The word "children," in this will, is a word of purchase and not of limitation. The plaintiff, consequently, only takes a life estate, with remainder to his children as tenants in common in fee. The only case where the word "children" is construed as a word of limitation is when the devisee has no children living at the date of the devise: *Wild's case*, 1 Tudor, R. P. cases 669, 3rd Ed.; *Guthries' appeal*, 37 Penn. 9, 5th Am. Ed. Jarman, vol. 3, 174 and 176. It is, in this view, unnecessary to consider whether or not the clause restraining alienation is good as a restraint upon alienation, it is rather to be considered as a clause limiting the estate to be taken by the plaintiff, and its effect is to cut down the estate in fee, apparently given to the plaintiff, to a life estate. *Jeffrey v. Scott*, 27 Gr., is expressly in point.

Bethune, Q.C., in reply. If the plaintiff took a mere life estate, as contended by the other side, then the defendants only take a life estate in the remainder, and there is an intestacy as to

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the fee. Such a construction the Court should not readily adopt. By the construction contended for by the plaintiff the whole estate is disposed of, and that is to be preferred where the will is doubtful. *Curia advisari vult.*

27th January.

BOYD, C.,—I have difficulty in defining precisely the manner of the testamentary devolution of the estate in question in this case, because the construction of the will was not argued with reference to that specifically; but, upon the general question presented on the pleadings, I have come to the conclusion that the plaintiff cannot, by his own conveyance, confer an indefeasible estate upon the intending purchaser. The will was made in 1866, at which time the testator's son had several children, who are yet alive. Some have been born subsequently to the will, but as a class they were then existing. The only clause relating to the land in question reads as follows, (the learned Chancellor read the clause above set out). The internal evidence supplied by this language, indicates that the will was the production of a draftsman learned in the law. The limitation of the land is to "John Dickson, to his heirs and executors." The inartistic expedient of prohibiting mortgaging or selling, is employed with a view to keep the farm for the use of his children after his death. The clear intention of the testator is, while giving the farm to his son, to provide "that it shall be to his (the son's) children after his decease." The first words give unquestionably an estate in fee simple absolute to the plaintiff. The last words as plainly declare, without resorting to technical language, that the son's children are to have the place after their father dies. The whole of the clause is to be read together, and if possible, effect is to be given to every part of it. If there is to be any preference in regard to conflicting limitations, the leaning of the Court should be in favour of that which is last.

Of possible constructions, the following have the most to commend them and, while it is not needful for me to decide on any one in particular, they all agree in manifesting an interest in the children of the plaintiff, which is the point I now decide as being sufficient for the disposal of of the matter in controversy.

(1.) Full effect can be given to all the words by holding that there is an estate in fee vested in the plaintiff, but subject to be defeated by

executory limitation to his children after his decease, if any survive him. This would enable the plaintiff to convey in fee simply, but subject to defeasance if he predeceased his children. *Barker v. Barker*, 2 Sim. 249; *Spence v. Handford*, 4 Jur. N.S., 987.

(2.) The earlier technical words "to his heirs," may be rejected as being used ignorantly, or in misapprehension of their effect. This would cut down the first devise to one of a life estate only, and would vest the remainder in fee in the children, as tenants in common, *Sherratt v. Beatty*, 2 My. & K. 149. Such was the conclusion arrived at in a very tenaciously argued case, which came twice before the Supreme Court of Pennsylvania, *Wert v. Merkel*, 81 Penn. 332, in 1876, and *Ulrick's appeal*, 86 Penn. 386, in 1878, in which the provisions were almost identical with those in the case now in hand.

Or (3.) It may be held that the effect of the later words is to intercalate a life estate of the children between an estate for life in the plaintiff and the ultimate remainder in fee, vested in him by the first words of the clause. Such appears to have been the decision in *Chyck's case*, as reported in 3 Dyer 357a. This devise of the "fee simple of my estate to B. and after his decease to her son C." It was held that B. had an estate for life, remainder to her son C. for life, and the fee simple thereof to B. In the note it is said that Bendloe and Anderson both report this case as adjudged that C., the son, shall have the fee after the life estate of the mother determined. See also *Doe d. Herbert v. Thomas*, 3 A. E. 128, where *Chyck's case* is referred to with apparent approval by Littledale, J.; and *Doe d. Arnold v. Davies*, 4 M. W. 599; and *Gravener v. Watkins*, L. R. 6 C. P. 505.

At present I am inclined to regard the last as the preferable construction.

The plaintiff should pay the infants' costs.

Div. Ct.]

BURK V. BRITAIN.

[Div. Ct.]

FIRST DIVISION COURT—NORTHUMBERLAND AND DURHAM.

BURK V. BRITAIN.

Division Court—Power of Judge to make order striking out defence before trial.

This was an action brought for money lent by the plaintiff to the defendant. The defendant in proper time filed a notice of defence. The plaintiff applied for an order similar to that provided for by Rule 80, O. J. A.

Held, that by clause 244 of the Division Court Act, the Judge has power, when the plaintiff satisfies the Court of his belief in the justice of his claim, and the defendant is unable to satisfy the Court of the merits of his defence, to make an order striking out the defence, and empowering the plaintiff to sign judgment without a formal trial of the action.

[Cobourg, Dec. 30, 1882.—CLARK, Co. J.]

This was an action for money lent by the plaintiff to the defendant, and was commenced by a special summons. The defendant in proper time filed a notice of defence, and the case, in the ordinary course, stood for hearing at the next sitting of the court. An application was made by the plaintiff, similar to that provided for by Rule 80 of the Ontario Judicature Act, and upon material which the learned Judge, if he had felt he had the power to make the order asked for, considered sufficient to throw upon the defendant the onus of satisfying him that his defence ought to be further inquired into.

The counsel for the defendant contended that the Judge had no authority to grant the order. No other cause was shewn.

CLARK, Co. J.—Under the circumstances of this case, I cannot escape the responsibility of deciding whether the existing law empowers me to order immediate judgment against a defendant, though, according to the statutes and rules relating especially to Division Courts, he has done all that is prescribed as sufficient to entitle him to be heard at a formal trial of the rights of the parties, before judgment is given against him.

The spirit of the legislation on such subjects, has been for many years past in the direction of sweeping away dilatory defences, so that creditors may obtain as quickly as possible judgment and execution for debts really due.

For a long period the practice in Division Courts (except where confession was voluntarily given) did not permit any judgment to be enter-

ed up against a defendant before the day appointed for hearing, though he had no defence and urged none. Every unsettled case in which the defendant had been served with process was called in Court, and it was only when the defendant failed to appear on a trial that even an undefended case could be disposed of. The unreasonableness of this delay led to a statutory amendment of the practice about fourteen years ago, since which time judgments may be entered as a matter of course by the clerk (when the defendant omits, within a specified period after service, to give notice of a defence). Since this amendment there has been no practice especially established for Division Courts, either by statutes or by rules framed by the Board of County judges or otherwise, by which any method is given for disposing of a formal defence once put in, otherwise than at the time appointed for a trial of the merits of the case.

The legislature has from time to time acknowledged the injustice of permitting debtors, by making a sham defence, to delay their creditors in recovering the amount due.

One step in that direction, was permitting a plaintiff to examine a defendant under oath, and if his answers disclosed such facts as shewed him to have no defence, then, on application to the Court, the defence might be struck out, and proceedings had as if none had been raised.

This departure from the previous practice was not, in my opinion, a matter of detail; it involved a principle, namely, that a formal defence ought not to be allowed to hinder a plaintiff, if he could show, before the time of a regular hearing, that there was no real defence.

That principle, however, still left with the plaintiff the responsibility of procuring and showing to the Court such evidence concerning the facts as would expose the fallacy of the defence.

The Ontario Judicature Act has gone one step further and has, in Rule 80, established what I conceive to be another new principle in practice, namely, that, in a certain class of cases, and after particulars given in a specified manner, the plaintiff, in his effort to get judgment, notwithstanding a formal defence, need not elicit facts upon which any opinion may be formed concerning the validity of the defence; he need shew to the Court nothing more than the sincerity of his own belief in his own case, after which the defendant has to convince the Court that he ought to be allowed to defend, or judgment goes against him.

Bearing in mind that neither the public necessity for a prompt collection of the debts, nor the practice of the Superior Courts to that end, can of itself authorize me in ordering a judgment to be now entered against the defendant in the case, I have to say whether there is any sufficient ground for my doing so.

Div. Ct.]

BURK V. BRITAIN—NOTES OF CANADIAN CASES.

[Sup. Ct.]

I have come to the conclusion that the last clause (244) of the Division Court Act gives me authority for adopting and applying in my discretion the principle of Rule 80, of the Judicature Act, to Division Court cases.

It says: "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of common law to actions and proceedings in the Division Courts."

If this clause had been imperative, instead of permissive; if the language had been "shall," instead of "may, in their discretion;" then, it seems clear to me, that each time a new principle was introduced into the practice of the Superior Courts it would be the duty of a County Judge to adopt it, and apply it to Division Court cases, overcoming as best he could any obstacles in the details of practice necessary to carry it out. But in the present shape, a duty remains to the Judge, namely, to exercise a discretion, and to adopt the principle, if in his judgment it is proper to do so.

This clause relates not to the practice itself, but to the principles of practice.

It is manifest that the practice, that is, the manner of proceeding from step to step in the progress of a cause, could not be the same in Superior and Division Courts; the fact that for the latter there is generally no judge to be found in the locality where the officers of these Courts are established, makes impossible a practice similar to that of the superior Courts; and there are other innumerable details which would stand in the way of adopting in these small courts exactly the practice of the higher ones. But that is no reason why the same principles of practice should not prevail, as principles of law do in both—by principles of law I mean those rules by which when they come to be heard, the merits of the contest are to be finally decided—rules which, by section 80 of the Judicature Act, are declared, within the limits of the jurisdiction, to be in force in all Courts in Ontario. By principles of practice I mean those leading objects for the attainment of which the precise method of proceeding may be shaped as a subordinate matter. Preventing an untrue plea being even temporarily an obstacle to the recovery of a just debt is an illustration of a principle. The method of making the application, the notice to be given of it, &c., are only details.

Adopting then, as I do, this principle, that a defence, though formally set up, shall not be allowed to delay the entry of judgment when the plaintiff satisfies the Court of his belief in the justice of his claim—the defendant not being able to satisfy the Court of the merits of his defence or of some other fact which would make a hearing expedient—it becomes my duty to order judgment in this case to be forthwith entered against the defendant. The manner of making the application for such an order on the one

side, and of resisting it on the other side, are details which each Court by virtue of its inherent powers may settle for itself, unless and until they be otherwise settled by higher authority. It is not necessary here to discuss the inconvenience of applications such as this being in Division Court cases disposed of only at a hearing before the Judge, involving, as that does, an attendance at the county town. If the principle can be adopted, the manner of giving effect to it may be left for future consideration.

I am fortified in the general view which I have expressed, by finding that my able coadjutor, Judge Benson, has, after consideration of the subject, arrived at the same conclusion.

The order will direct that judgment be forthwith entered for the debt and interest claimed by the endorsement on the summons, and for costs to be taxed to the plaintiff.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

RUSSELL v. LEFRANCOIS.

Will, validity of—Insanity—Legacy to wife—Error—False cause—Question of fact on appeal—Duty of Appellate Court.

This was an appeal from the Court of Queen's Bench for Lower Canada. The action was originally brought in the Superior Court by Pierre LeFrancois' executor under the will of the late Wm. Russell, of Quebec, against William C. Austin, curator of the estate of Russell during the lunacy of the latter, to compel Austin to hand over the estate to the executor.

After preliminary proceedings had been taken, Elizabeth Russell, the present appellant, moved to intervene and have Russell's last will set aside, on the ground that it had been executed under pressure by Dame Julie Morni, Russell's wife, in whose favour the will was made, while the testator was of unsound mind. The intervening party claimed and proved that Morni was not the legal wife of Russell, having another husband living at the time the second marriage was contracted. Russell, who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$16,000. The evidence in the case was very voluminous and contradictory. On 4th October, 1878, Russell made a will by which he bequeath-

ed \$4,000 and all his household furniture and effects to his wife, Julie Morni; \$2,000 to his niece, Ellen Russell; \$1,000 to the Rev. Father Seaton, for charitable purposes, and the remainder of his estate to his brothers, nephews and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife, Julie Morni, \$400 to each of his nieces, Mary and Elizabeth Russell, and \$400 to his brother Patrick, with reversion to the nieces if not claimed within a year, and the remainder to Ellen Russell. On the 27th November, 1878, Russell made a will, which is the subject of the present litigation, and by which he revoked his former wills, and gave \$2,000 to Father Sexton, for the poor of the parish of St. Rocks, and the remainder of his property to his wife Julie Morni.

On the 10th January following, Russell was interdicted as a maniac, and a curator appointed for his estate. He remained in an asylum until December, 1879, when he was released and lived until his death with his sister, Ellen Russell, sister of the appellant. Mr. Justice Tessier, of the Superior Court, upheld the validity of the will, and his decision was confirmed by the Court of Queen's Bench.

Held, (i.) [reversing the judgment of the Queen's Bench, RITCHIE, C.J., and STRONG, J., dissenting,] that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 27th November, was that the testator, at the date of the making of the said will, was of unsound mind. (ii.) That, as it appeared that the only consideration for the testator's liberality to Julie Morni was that he supposed her to be "my beloved wife Julie Morni," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void, through error and false cause. (iii.) That it is the duty of an Appellant Court to review the conclusion arrived at by Courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credulity of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case.

Irvine, Q.C., for the appellant.

Andrews, and *Fitzpatrick*, for the respondents.

COURT OF APPEAL.

[Dec. 29, 1882.]

TOTTEN V. BOWEN.

Husband and wife—Bill of sale—Chattel Mortgage—Fraudulent Preference—Bona fides—R. S. O. ch. 118.

The plaintiff was married in 1876 without any marriage contract or settlement, being possessed of about \$1,500 derived from the estate of a former husband, which she lent at different times to her husband, a small portion having been lent prior to their marriage. In January, 1879, on a further advance of \$200, she obtained from her husband a chattel mortgage of certain goods, farm stock, implements and other chattels, which was duly registered but not renewed. In November, 1879, she insisted upon and obtained from her husband a bill of sale of the same, and other goods, for the express consideration of \$300. The plaintiff and her husband continued to reside together, and apparently he had the use of the goods in much the same way as prior to such bill of sale being made, she and her sons working the farm on which the parties resided, and which had been conveyed by her husband to a trustee for the benefit of the plaintiff, the husband working or not as it pleased himself. The evidence established the *bona fides* of the claim set up by the plaintiff, and for the purpose of securing a creditor of the husband she executed a chattel mortgage in her own name on those goods.

Held, [affirming the Judge of the County Court, York], that the claim was not invalidated for want of registering the bill of sale, or as being fraudulent against creditors under R. S. O. ch. 118.

Rose, Q.C., for appellant.

S. M. Jarvis, contra.

[Dec. 27, 1883.]

CANADIAN BANK OF COMMERCE V. WOODWARD.

Accommodation note—Security for payment of note—Renewal of note.

The defendants made a note for \$200 for the accommodation of one M., and delivered the same to M. to be used by him as collaterally securing payment of a note of M.'s own for a like amount. M. discounted his own note with the plaintiffs, and delivered to them the promissory

note made by the defendant, as such collateral security. When M.'s note fell due, he did not pay it, but paid \$25, and gave a new note for \$175.

Held, that the defendants remained liable to the plaintiffs to the extent of the renewal note, which was in reality a continuance of the \$200 note. In no sense can renewing a bill or note be treated or taken to be payment.

J. K. Kerr, Q. C., for appeal.

Johnson, contra.

[Jan. 17.]

RE HALL'S EXTRADITION.

Appeal—*Extradition*—*High Court*, *appeal from*—*Court of Appeal equally divided*, *effect of*—*Habeas Corpus*—*Res Judicata*—*Binding authority*.

The prisoner was remanded for extradition by the Chancery Division of the High Court of Justice. On appeal, this Court was equally divided. A second writ of *habeas corpus* was then obtained, and the prisoner was again remanded for extradition by the unanimous judgment of the Common Pleas Division, before whom the question was then argued, and an appeal from that decision was dismissed.

Per HAGARTY, C. J. [SPRAGGE, C. J. O., concurring].—The appeal could not be entertained, there having already been an appeal by the prisoner to this Court, from the judgment of the Chancery Division, which was binding on the prisoner, and he was not at liberty to make repeated applications to this Court on the same state of facts.

Per PATTERSON, J. A.—Under the Judicature Act there is not any distinction in the several Divisions of the High Court; therefore a decision of any one of them is a decision of the High Court; consequently, this matter had already been disposed of on the appeal from the Chancery Division.

Per BURTON and PATTERSON, J. J. A.—The rule of practice in the House of Lords on an equal division, does not apply to other appellate tribunals, although as here the appellate court is the one of last resort. The effect of this Court being equally divided is simply that the matter drops, and therefore the appeal is dismissed, the judgment remaining undisturbed; at the same time it is not viewed as a binding authority.

CHANCERY DIVISION.

Proudfoot, J.]

[Jan. 31]

COURT V. HOLLAND.

Mortgagee and mortgagor—*Account*—*Evidence*—*Appeal from Master's report*—*Money lent*—*Amendment of account*.

In taking an account of moneys due on a mortgage given to secure whatever might be due for money lent, part of the amount claimed was alleged to be due in respect of a bill of exchange drawn by the mortgagors and accepted by the mortgagees. It was sworn by one of the mortgagees that this bill of exchange had been accepted for the accommodation of the mortgagors. But in a statement of "bills receivable" in a list of notes due by the mortgagors to the mortgagees, subsequently made out by a clerk of the mortgagees, this item was not included.

Held, notwithstanding the omission of this item from the accounts, the positive evidence of the mortgagee that the bill was for the accommodation of the mortgagors, and the circumstances under which the mortgage was given, were sufficient evidence to rebut the *prima facie* presumption that the bill was accepted in payment of a debt due by the mortgagees to the mortgagors; and an appeal from the Master's report, disallowing the item, was allowed.

Where mortgagors who had given a mortgage to secure whatever might be due from the mortgagors to the mortgagee for moneys lent, were authorized to receive, and did receive, as agents of the mortgagees, a sum of money due to the mortgagees upon another mortgage, which moneys they retained.

Held, that the moneys as received by the mortgagors, were in effect on being retained by them, "moneys lent" and secured by the mortgagee, and an appeal from the Master's report, disallowing this item, was allowed.

Where a mortgagee in putting in his claim before the Master, under a mortgage given to secure whatever might be due for moneys lent, in his account claimed an item of \$1,434.06 for "balance of merchandize account," and subsequently asked to be allowed to amend the account by claiming it to be a "balance due for a loan of £1,200."

Held, that the amendment should be allowed, and it appearing from the evidence that the item in question was in fact a balance due for money

loaned, an appeal from the Master's report, disallowing this item, was allowed.

MacLennan, Q.C., and Langton, for plaintiff.

Bethune, Q.C., and Whiting, for defendants.

Ferguson, J.]

Feb. 5.

LUMSDEN v. SCOTT.

Insolvent—Demurrer.

A creditor's assignee cannot sustain a suit to set aside a fraudulent conveyance or assignment made by the debtor, the assignor, prior to the assignment under which the creditors' assignee claims.

Demurrer to statement of claim.

Plaintiff sued under an assignment from one Moore, a debtor, to set aside as fraudulent and void a certain assignment of property, made by Moore to the defendant, prior to the assignment from Moore to the plaintiff. The assignment to the plaintiff was stated to be in trust for the benefit of the plaintiff and all other creditors of Moore. The statement of claim did not allege the plaintiff himself to be a creditor.

Demurrer allowed with costs.

Re Andrews, 2 App. R. 24, distinguished.

Sheppard, for the demurrer

B. B. Osler, Q.C., contra.

Ferguson, J.]

[Feb. 5.]

TIDEY v. CRAIB.

Chattel Mortgage—Fraudulent preference—

R. S. O. c. 119.

Action on behalf of creditors to set aside a certain chattel mortgage on the ground of fraud and fraudulent preference.

The defendant Craib, jun., and Jaffrey, executed a chattel mortgage to the plaintiff on May, 8, 1879, to secure certain moneys owing to him by them; but the plaintiff omitted duly to renew this mortgage. Prior to September 19, 1879, Jaffrey sold his interest in the property mortgaged to Craib, jun. On September 3, 1880, Craib, jun., executed a chattel mortgage on the same property to Craib, sen., (his father), and J. Craib, his brother, to secure certain moneys. Craib, sen., and J. Craib were aware at the time of the mortgage of September, 3, 1880, of Craib, junior's debt to the plaintiff.

Held, though they were thus aware of the existence of the debt to the plaintiff, and nevertheless took care of their own interest, this was not a good and sufficient reason for saying the

mortgage to them was not *bona fide*; and, the evidence otherwise shewing the mortgage to them to be *bona fide*, the plaintiff's unrenewed mortgage was void as against them, under the Chattel Mortgage Act, R. S. O. c. 119.

Held, also, there was no fraudulent preference, for the evidence showed that Craib, jun., did not make the mortgage of September, 3, 1880, voluntarily, but was coerced into making it by the mortgagees.

Held, also, though the affidavit of the debt required by R. S. O. c. 119, was made by J. Craib only, this was sufficient on authority of *McLeod v. Fortune*, 19 U. C. R. 100, and *Severn v. Clarke*, 30 C. P. 363.

The consideration for the mortgage of September 3, 1880, was not all an existing debt at the time of the execution thereof; as to part of it, P. Craib, sen., and J. Craib, was at that time only liable on promissory notes.

Held, nevertheless, following *Walker v. Niles*, 18 Gr. 210, and *Hamilton v. Harrison*, 46 U. C. R. 127, this did not invalidate the mortgage. Our R. S. O. c. 119, not requiring, as does the corresponding English Act, that the consideration for the mortgage should be truly expressed.

Ball, Q.C., and W. Cassels, for the plaintiff.

C. Moss, Q.C., and Nesbitt, for the defendants.

Ferguson, J.]

[Feb. 5.]

MCGREGOR v. MCGREGOR.

Allowance for improvements and occupation rent—Mistake of title—Master's office.

This was an appeal from the report of the Master, made pursuant to the reference directed in this case, as reported 27 Gr. 470.

M. had gone into possession of certain lands in 1857 by the consent of the then owners. The lands were never, however, conveyed to him by valid conveyance, and the rights of the plaintiffs therein accrued on May 7th, 1873. The decree directed the Master to take an account of the rents and profits received by M. since May 7th, 1873, and to charge him with a proper occupation rent since that date, and also to take an account of the amount by which the lands in question had been enhanced in value by lasting improvements made thereon by M. under the belief that the said lands were his own.

The Master found M. entitled under this reference to an allowance for only a small portion of the improvements actually effected by him on

the lands, viz., those effected since a certain conveyance of the year 1866, and he only allowed him interest on the enhanced value by reason of the improvements for which he made allowance; nevertheless he fixed an occupation rent proportionate to the full annual value of the premises as they were at the time of taking the account.

Held, since the Master only found M. entitled to a portion of the actual improvements, and only allowed him interest on the enhanced value by reason of this portion of the said improvements, he should not have charged him with an occupation rent for the increased value by reason of the improvements that were not allowed him.

Carroll v. Robertson, 15 Gr. at p. 177, and *Re Brazill, Barry v. Brazill*, at p. 257, approved of and followed. *Fawcett v. Burrell*, 27 Gr. 445, commented on.

C. Moss, Q.C., and *G. Lount* for the appellant.
W. Cassels for the respondent.

PRACTICE CASES.

Osler, J.]

[Jan. 29.

CROZIER V. ALKENBACH.

Mortgage—Rule 322 O. J. A.

The defendant on the 21st June, 1881, executed a mortgage to one Northrop, for \$1300, payable five years after date, with interest half-yearly. The mortgage contained the usual proviso that the principal was to become due on default of payment of interest.

On the 7th September, 1881, the defendant sold and conveyed the premises to one Morton for \$4,500, on the following terms: Morton assumed the payment of the existing mortgage for \$1,300, and gave a mortgage for \$1,700 to Northrop, and executed a bond to the defendant for \$1,500 to secure the balance of the purchase money. On 14th September, 1881, Northrop assigned the \$1,700 mortgage to the plaintiff. The plaintiff's solicitor, it appeared, had acted as the solicitor for the parties in the above sale, and advised as to the particular manner in which the transaction was completed, and it was claimed by the defendant that the plaintiff, through his solicitor, had knowledge of the facts.

On the 19th May, 1882, Northrop assigned the \$1,300 mortgage to one Vair, who re-assigned

it to him on 27th October, 1882, and on the 30th October, 1882, Northrop assigned to the plaintiff.

This was a motion for judgment under Rule 322 O. J. A. in an action on the \$1,300 mortgage.

The defendant submitted that the land should be sold, and proceeds applied in payment of the mortgage, and that he was only liable for the amount, if any, due after deducting proceeds of such sale; or, if he was held liable to pay the full amount, that he was entitled to an assignment of the mortgage from the plaintiff.

Held, [overruling the decision of the Master in Chambers], that the application was properly made under Rule 322 O. J. A.; that the defendant as a mortgagor merely, was not entitled to an assignment of the mortgage and mortgage debt.

Aylesworth, for the motion.

Watson, contra.

Osler, J.]

[Feb. 2.

ALLEN V. MATHERS.

Trial—Postponement—Costs.

The plaintiff gave notice of trial for 2nd October. On 23rd September a summons taken out by defendant to postpone the trial was made absolute on condition that the defendant paid the costs of the postponement.

On 27th September the defendant's solicitor gave notice to plaintiff's solicitor that defendant would not pay the costs, and that trial must be proceeded with; and on the same day the plaintiff moved for an order to "postpone the trial until the Spring Assizes, with costs to the plaintiff, including the plaintiff's costs of the day for putting off the said trial, the plaintiff's costs of opposing the defendant's application, and the costs of and incidental to the said summons, the hearing thereof, and of this order."

This order was granted on the 28th December following.

On appeal, OSLER, J., varied the order of the 28th December, by directing the defendant's application to postpone the trial to be discharged with costs, and by limiting the costs ordered to be paid to the costs of that application, and allowed the defendant the costs of appeal.

Holman, for the plaintiff.

Shepley, for defendant.

Prac. Cases.]

NOTES OF CANADIAN CASES—GENERAL ORDER.

Mr. Dalton, Q.C.]

[Feb. 2.]

BRADLEY V. CLARKE.

Replevin—Third party—Rule 107, 108, O. J. A.

An action of replevin. The defendant gave notice, according to Form 18, Appendix B. O. J. A., and pursuant to Rules 107 and 108, to a third party claiming to be indemnified on a warranty.

On a motion by the defendant for a direction as to mode of procedure, and as to the extent to which the third party should be bound,

Held, that Rules 107 and 108 O. J. A., applied to actions of replevin.

Holman, for defendant.

Aylesworth, contra.

Mr. Dalton, Q.C.]

[Feb. 12.]

JOHNSON V. OLIVER.

Ejectment Striking out name of joint defendant.

This was an action for the recovery of land, and for mesne profits, brought against one Oliver, who was tenant of the premises under a lease from one Ross, who resides in Scotland. Ross had obtained an order allowing him to defend with Oliver. Oliver remained in possession under the lease for two months after service of the writ upon him, and during that time paid the rent to Ross. He then went out of possession, his lease having expired, and made this motion to have his name struck out of the writ and all subsequent proceedings.

Motion discharged with costs.

Shepley, for the plaintiff.

Clement, for defendant Oliver.

Arnoldi, for defendant Ross (the landlord).

Osler, J.]

Jan. 16.

VOTERS' LISTS OF THE VILLAGE OF L'ORIGINAL.

Voters' list—R. S. O. ch 9.

The assessment roll of a municipality was finally revised and corrected by the Court of Revision, on the 31st May, 1882. The Clerk of the municipality prepared the voters' list therefrom, and on 7th Sep., 1882, posted a copy thereof in his office as required by sec. 3 R. S. O. ch. 9. He did not transmit copies of the list to all the persons entitled to receive them under

ss. 3 and 4. No complaints having been received by him up to 30th October, he on that day signed the certificate and report mentioned in sec. 11 of the Act, and obtained the certificate of the deputy judge of the County Court on three copies of the last as being the revised list of voters for the municipality.

The judge of the County Court set aside the clerk's certificate, and the certificate of the deputy judge.

On a motion for a writ of prohibition, Osler, J.,

Held, that as soon as the list is posted up in the clerk's office, the time for making complaints in respect of it begins to run, and that time being by sec. 9 expressly limited to thirty days from the posting up of the list, and no complaint having been made within it, that the deputy judge was bound to certify.

That the duty of transmitting or delivering the printed copies of the list to the parties entitled to receive them, is prescribed in general terms without reference to date, and consequently the omission to transmit such copies to certain of the persons entitled to them, though done with intent, was not a valid ground for cancelling the revised list.

Prohibition granted.

Rose, Q.C., for the motion.

Shepley, contra.

GENERAL ORDER.

The following order has been issued, dated February 5, 1883:—

"Except during vacations, and excepting Sundays, Christmas Day, Good Friday, New Year's Day, the birthday of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, the offices of the Court shall be kept open from 10 a.m. to 4 p.m. During the sitting of the Divisional Courts, and at other times, from 10 a.m. to 3 p.m."

WANTED.

April numbers of "*Upper Canada Law Journal*" for the year 1856 (Vol. II. O.S.), for which \$1 each will be paid. Direct to Proprietors CANADA LAW JOURNAL, 68 Church Street, Toronto.

Canada Law Journal.

VOL. XIX.

MARCH 1, 1883.

No. 5.

DIARY FOR MARCH.

1. Thurs... St. David's Day.
4. Sun.... 4th Sunday in Lent.
5. Mon.... Osler, J., appointed 1879.
6. Tues... Co. Ct. for York, sitt. begin. Ct. of Appeal sitt. begin. Name of York changed to Toronto, 1834.
11. Sun.... 5th Sunday in Lent.

TORONTO, MARCH 1, 1883.

It has been recently settled by the Queen's Bench Division in England, that if an ox become unmanageable on a public highway, and through no negligence or want of skill on the part of the driver, rushes into an adjoining tenement, and does damages, the owner of the animal is not liable. *Tillett v. Ward*, 44 L. T. 546, therefore decides an interesting question as to who foots the bill for the eccentricities of a "bull in a china shop."

We read in the *Times* of the final retirement of Mr. Benjamin, Q.C., from practice. Mr. Benjamin has for many years been almost the leader of the English Bar in all heavy appeal cases. His career has been very remarkable. He was born in 1811, on the island of St. Croix. His parents were English, but of Jewish persuasion. He spent three years at Yale, and was called to the Bar at New Orleans as long ago as 1832. He soon acquired a large practice in the courts of the United States, and sat for some time as Senator for Louisiana. When war broke out between the Northern and Southern States Mr. Benjamin gave his undivided and most active adherence to the Confederate cause. He was Attorney-General, Minister at war, and ultimately chief Secretary of State to Jefferson Davis; and when General Lee had to surrender his sword at Appotomax, Mr. Benjamin, whose personal safety was in danger,

had to escape as best he could. He had been in reality the soul of the rebellion. His entire property was confiscated, and it is an interesting fact that his law library was bought in by public subscription and presented to him. It is now in his chambers in the Temple. He came to England, and through the personal influence of Lord Cairns was called to the Bar after keeping his terms for one year only. He at once acquired a large practice at Liverpool, where the principal firms of solicitors have intimate relations with the leading legal houses of New Orleans. Within six years he was given silk, and since then has been engaged in almost every case of importance. He has never taken any part in English politics, and has always lead an extremely retired life.

THE SUPREME COURT AND ITS CRITIC.

COMPLAINTS have been made of late years that the liberty of the press has degenerated into license. When the lay press attacks the Bench (and it is pleasant to know that it has not often so offended), it is in general charitably attributed to ignorance, or to the spleen of some disappointed suitor. It is reserved for a legal journal to use language towards a Judge of the Supreme Court quite as outrageous and unjustifiable as any that has yet appeared in the columns of the most reckless partizan sheet.

It was decided by the Superior Court of the Province of Quebec, that the notice of action in *Grant v. Beaudry*, was insufficient, and the suit was therefore dismissed. Our readers will remember that this suit was brought by the Orange Grand Master against the Mayor of Montreal for false arrest.

THE SUPREME COURT AND ITS CRITIC.

The plaintiff appealed against the ruling, but the Court of Queen's Bench in Quebec upheld it. This judgment disposed of the only point before the Court, which, as an appellate Court, was then *functus officio*, and had no jurisdiction to decide as to the legality or illegality of the Orange Association. The judges, however, took upon themselves to state their opinion that the association was an illegal one. The Court of first instance had not passed upon this question, and it was not, therefore, and could not have been, a subject of adjudication for the Appellate Court. The plaintiff again appealed, and brought the case before the Supreme Court of Canada when the insufficiency of the notice was affirmed. The Judges, however, declined to discuss the legality or illegality of the Orange Order; one of the Judges, at least, Hon. Mr. Justice Gwynne, very properly remarking that the Provincial Court of Appeal unnecessarily and voluntarily took the functions of a Court of first instance, and that its opinion as to the legality or otherwise of the Orange Order was extra judicial and unwarranted.

A writer in the editorial columns of the *Legal News* of Feb. 10, over the signature R., says:—that "it is difficult to conceive expressions more offensive."

The difficulty is rather in conceiving it possible for any lawyer to take the ground advanced by this writer. If he had read the English Reports he would have noticed language much more severe and caustic by appellate judges in reference to the judgments of learned judges in courts below in matters of far less consequence. A moment's reflection will show that the language of the Supreme Court is exactly correct, and that this final Court of Appeal would have been derelict in its duty if it had failed to remark upon the unwarrantable and unheard-of action on the part of the Court of Queen's Bench, in giving an opinion on a subject which was not before the Court as a Court of Appeal, and had not even been discussed in

the Court below, and of the existence of which the Queen's Bench had no judicial notice. The voice of the profession, we venture to say, will even go beyond the language of Mr. Justice Gwynne, and say that his remarks were more moderate than the occasion warranted.

The person who writes the article from which we have quoted not only shows that he is incompetent to speak of the law of the case, but exhibits a spleen and disregard of the decencies of journalism, when commenting on the judgments of the judges of the land, not only remarkable in itself, but especially so in view of the allegation to which we shall presently refer. The article goes on to say: "The effect of such denunciation will probably, however, be less striking than Mr. Justice Gwynne expected. It will not hurt the reputation of that Court, and it cannot well hurt his. It suggests, however, two reflections. The first is, why so much passion? * * * The second reflection is that in declaring that the decision of the Court of Queen's Bench as to the merits of *Grant v. Beaudry* was extra judicial and unwarranted, Mr. Justice Gwynne blundered in his law, as is his wont." We perfectly agree with R. that the judgment of the Supreme Court will hurt neither the reputation of that Court nor that of Mr. Justice Gwynne, one of its brightest ornaments. As to the Bar and the public of Ontario, the last remarks of R. above quoted will only excite contempt as to his capacity to judge of such matters, and pity for his ignorance. As to the readers of the *Legal News* in Quebec we can tell them, without fear of contradiction, that Mr. Justice Gwynne enjoys the confidence of the profession in Ontario to a very marked extent, and that when advising on appeals to the Supreme Court they are not uninfluenced by the fact that there is on the Bench of the Supreme Court a man of such high personal standing, of such an acute mind, and such deep research and learning as Mr. Justice Gwynne.

And now as to the person who undertakes to enlighten the readers of the *Legal News*. On 31st March, 1882, the following letter was addressed and appeared in the columns of the *Montreal Herald* :—

"An article headed 'Proposed Legislation,' and signed 'R.,' in the last number of the *Legal News*, abusing Mr. McCarthy and the whole House of Commons, is evidently from the same pen and from the same diseased mind as those which appear periodically in the same paper, under the same signature, against the Supreme Court of Canada. Now, it is currently reported that these articles have been written by one of the Judges of the Court of Appeal. Such, I hope, is not the case. The members of the House of Commons and the Judges of the Supreme Court can, of course, well afford to despise such inoffensive, though vituperative scribbler, and treat them with contempt, but the public of this Province has the greatest interest to ask a contradiction of the rumour which assigns the authorship of them to one of our judges, and I hope that the editor of the *Legal News* will be able to give such a contradiction in its next number."

We understand that no such contradiction was ever given, and it is said that R. in the above letter, and R. in the *Legal News*, of the 10th Feb., are one and the same person, and that such person is one of the Judges of the Court of Queen's Bench for Quebec. This may be entirely incorrect, and we shall be glad to know through the columns of the *Legal News*, that it is so. If it be true it would seem to throw a little daylight on the true inwardness of the remarks of Mr. R. Some judges are apt to be sore when they are over-ruled, and some apparently have a very "extra judicial and unwarranted" way of showing their feelings. We trust, however, for the credit of the Canadian Bench that it may be shown that the remarks to which we take exception were not those of any one in such a responsible position as that of a judge.

HUMOROUS PHASES OF THE LAW.

(Continued.)

Negligence is an extensive theme. Here we have the case of the boy in the apple-tree, who was shot by a volunteer firing at a mark, and we are told that the court in considering it a case of manslaughter did not consider the question whether the apples would not have killed the boy even if the rifle had not : (*Regina v. Salmon*, 62 Q. B. D. 79). A humorous gentleman in Iowa undertook to frighten a lady neighbour with a revolver ; the weapon somehow went off, and the lady died of the fright. The court thought this was manslaughter, and sent the joker to prison for a year to give him an opportunity for reflection : (*State v. Hardie*, 27 Iowa, 647). If one in setting off Roman candles, even from his own house, injures another, he must pay for it : (*Fisk v. Wait*, 104 Mass. 71). The owner of a horse knew that his animal had a good ear for music and did not like street organs ; nevertheless, he drove where one was grinding out doleful tunes ; the horse ran over and smashed the organ and the organist ; the court gave the grinder £25, and told the owner of the steed to pay. Icysidewalks are a fruitful source of litigation. Coke, we are told, had no trouble with such cases, nor with many another class which now puzzles judge and jury.

While all good Boston people were honoring the Grand Duke Alexis, and the audience in the hall where the reception took place were singing the "Old Hundred," the bust of Benjamin Franklin fell from aloft, and hit Mrs. Kendall, injuring her. But the law would not give her any pecuniary consideration. She had to bear her woes unmitigated by the touch of money, like many another who has been hit by "Poor Richard" : (*Kendall v. Boston*, 118 Mass. 234). In Montreal it was held that if a servant girl let a shutter fall upon a passer by, the master is liable.

Apropos of the question, Is it negligence not to call a physician for a sick child ? we

HUMOROUS PHASES OF THE LAW.

are told of some of the doings of the Peculiar People in England, and of a Pennsylvanian who practised the Baunscheidt system in his family. The case of the horse killed by eating clippings of a yew tree, was, we find, decided upon the doctrine of "sick yew-tree chew oh!": (*Crowhurst v. Amersham Burial Ground*). From the decision where a cow was killed by eating a fragment of a decayed iron fence, our author says, *semble*: "if the wife of the occupant of a house should moult her old hoop-skirt, and throw it into her next door neighbour's yard, and the neighbour's cow should feed on it, and die in consequence, the husband would be liable": (*Frith v. Bowling Iron Works Co*). But long since it was decided that an action will not lie for carelessly leaving maple syrup in one's uninclosed wood, whereof the plaintiff's cow drank too much and died: (*Bush v. Brainard*, 1 Cow. 78).

In the "Nuisance" chapter, we have several interesting cases of disturbing public worship. We learn that undue haste in getting to church is not punishable: Brown, not our author, and some friends, galloped up to within fifty yards of the sacred edifice; on their way, one caught a cow by her tail, causing her to jump and ring her bell; another, when in church lay upon a rickety bench, which creaked every time he moved. These good young men all escaped punishment on the ground that there was nothing wilful in their conduct. A youth cannot insist upon sitting among the ladies at a camp meeting, if it is against the rule, even though he be an infant. Sometimes disturbing religious people in their sleep after they come from service, is not punishable: but a wicked young man at a camp meeting was punished for purloining the preacher's tin horn, and making night hideous by acting Gabriel: (*Brown v. State*, 46 Ala. 175; *McLean v. Justtock*, 7 Ind. 625; *State v. Edwards*, 32 Mo. 550; *Fenning's case*, 3 Gratt. 624).

It is a misdemeanor to curse in the private ear of a Methodist at a camp meeting: but

the disturbed brother has no action for damages: Hunt and his friends had to pay \$25 each, for cracking and eating peanuts in church: (*Cockreham v. State*, 7 Humph. 11; *Oreen v. Herman*, 1 W. & S. 448; *Hunt v. State*, 3 Tex. Ch. App. 116). We rejoice to find that the morals of North Carolina are improving. Forty years ago the law did not deem it a nuisance for one to curse and swear publicly for the space of two hours: now to swear for five minutes is too much: (*State v. Jones*, 9 Ired. 38; *State v. Chusp*, 85 N. C. 528).

Noise is often a decided nuisance. "But if the rocking of a cradle, the wheeling of a carriage, the whirling of a sewing machine, or the discord of ill-played music, disturb the inmates of an apartment house, no relief by injunction can be obtained, unless the proof be clear that the noise is unreasonable and made without due regard to the rights and comforts of other occupants." A poor boarding-house keeper failed to enjoin the midnight performance of negro minstrels in an adjoining saloon. In *State v. Brown*, 69 Ind. 95, the court said, "the defendants were probably engaged in giving a newly wedded pair that kind of concert or serenade which is usually called a charivari. Such a concert is usually much more entertaining to the performers than it is to the audience, and when it is engaged in by three or more performers, with zeal and earnestness, it may often be denominated as a riot, and the performers therein may be subjected to the punishment prescribed for such offence." In *Harrison v. St. Mark's Church*, Philadelphia, 15 Alb. L. J. 248, we have a case very similar to the well-known one of *Soltau v. De Held*. In the former case the bells of the church were rung four times on Sundays, and twice on every week-day, and on festivals and saints' days from ten minutes to half an hour at a time, averaging from seventy-five to ninety-four strokes a minute. This was deemed too much of a good thing, and was enjoined.

HUMOROUS PHASES OF THE LAW.

Grouped under "Trade Marks" we find many amusing instances of names, descriptions and devices which have been deemed likely to deceive the careless public from their similarity to other names, descriptions and devices which have gained a reputation.

Under the title of "Newspaper Law," Mr. Browne briefly treats, not of the law which the newspapers lay down, which (he says) is sometimes very bad, but rather of the law which is supposed to apply to them in regard to their utterances and to their contracts with subscribers. In theory the newspapers are responsible in damages for what they publish when they exceed the limits of reasonable free speech; but in practice, through the favor of the jury, which they are so accustomed to decry and abuse, their privilege frequently degenerates into unrestrained license. Courts on the other side of the line have held that the fact that the plaintiff is a candidate for office is no mitigation in an action for libel: (*Sanderson v. Caldwell*, 45 N. Y. 398); and we have here a number of expressions, more strong than elegant, which juries have shown editors that they should not use concerning public men. Some of our Canadian editors should study these. Irony is not always safe, even when used by one newspaper man about another. It may be libelous to falsely accuse one of poverty: (*Moffat v. Caldwell*, 3 Hun. 26).

Mr. Browne tells editors and publishers how far they may let their spleen, or their imagination, or their desire to turn a penny by sensational articles, carry them with theoretical safety, and how much further the favor of modern juries will suffer them to strain their utterances. It is not a libel if a writer, in consequence of his caligraphy, is made to say nonsense.

Under "Practical Tests in Evidence," we have the case of a dispute as to the goodness of some beer, for the price of which an action was brought. The court adjourned to taste the beer; if it was good the defendant was to pay, otherwise not. The clerk never re-

corded the verdict! Photographs are often used to establish personal identity, or to show the appearance of persons or places, and on questions of hand-writing. In the case of *Cowley* the clerical superintendent of the "Shepherd's Fold," convicted of starving one of the lambs, photographs were held admissible showing the appearance of the lamb when received from the gentle shepherd's hands, and his appearance, in the normal condition of *avoids*, before entering the fold: (*Cowley v. People*, 83, N. Y. 464). A living likeness has sometimes been used in evidence. In *State v. Smith*, 54 Ia. 104, in a prosecution for bastardy, it was held allowable to exhibit the alleged bastard child, two years old or more, to the jury, and permit them to determine as to the family resemblance between such child and the alleged putative father. But where the child was only three months old this was not allowed, because of the peculiar immaturity of the features of an infant of that age: (*State v. Damforth*, 48 Ia. 43).

Sergeant Ballantyne, in his "Experiences," tells a story quite *apropos* of such cases of an occurrence at the Marylebone Police Court. The Sergeant was appearing for a client who was suggested to be the father of an infant; he says: "Mr. Broaderip (the magistrate) very patiently heard the evidence, and notwithstanding my endeavours, determined the case against my client. Afterwards, calling me to him, he was pleased to say, 'You made a very good speech, and I was inclined to decide in your favour, but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no mistake, the likeness was most striking.' 'Why, good heavens,' said I, 'my client was not in court. The person you saw was the attorney's clerk.' And such truly was the case."

In this chapter on "Practical Tests," Mr. Browne might have referred to the case mentioned by Mr. Ballantyne, where a tailor sued Sir Edwin Landseer for the price of a coat

HUMOROUS PHASES OF THE LAW—RECENT ENGLISH DECISIONS.

for which the painter refused to pay, as the garment was so badly made, violating "every principle of high art." The judge suggested that Sir Edwin should try on the coat in court. This he did, amidst roars of laughter from all parts of the room, though much to his own disgust; yet the trial gained him a verdict. The recent case of *Belt v. Lewes*, tried before Mr. Baron Huddleston, where plaster casts and marble statutes were brought into court *ad nauseam*, is also in point.

With "*De minimis non curat lex*," this interesting little book is closed. Here we have proved that the law does not mind bad grammar, nor yet bad spelling. The California Supreme Court says it is of frequent occurrence that men of clear and vigorous minds, and who think, speak and write clearly, spell badly, and quotes Saxe, Marlborough, and Napoleon. The phonetic style of writing does not necessarily detract from a clearness of a composition. We have two or three pages of amusing instances of mis-spelling: "gilty," "confindement," "defendances guilty as charged in inditeselement." A mistake of a letter saved a man's property from confiscation, in the brave old days of old: (*Rex v. Parker*).

In respect to names, the law disregards bad spelling if they sound alike; and after this proposition, follows a long list of names, held to be *idem sonans*, and another of those held not to be *idem sonans*. The importance of a comma, a semi-colon, and a period, have been considered: (*Areson v. Areson*, 3 Denis, 438; *Lambert v. People*, 76 N. Y. 220; *Osborne v. Farwell*, 87 Ill. 89). In *Areson's* case, one of the members of the court says: "Punctualisne determines nothing." But just here a full stop must determine this review.

RECENT ENGLISH DECISIONS.

Continuing to review the *Law Reports* of January, the next case to be noticed in the Ch. Div. number, is *Loosemore v. Tiverton & North Devon Railway Co.*, p. 25.

RAILWAYS—COMPULSORY POWERS—EXPIRATION OF CHARTER.

This case raised a curious question on which apparently no authority precisely in point could be found. The special Act of the defendant railway incorporated the Lands Clauses Consolidation Acts, and by its sect. 39 it was provided that "the powers of the company for the compulsory purchase of land for the purposes of this Act shall not be exercised after the expiration of three years from the passing of this Act." Sec. 40 provided that "if the railways are not completed within five years from the passing of this Act, then, on the expiration of that period, the powers by this Act granted to the company for making and completing the railways, or otherwise in relation thereto, shall cease to be exercised, except as to so much thereof as is then completed;" with which latter section may be compared the clauses to be found in special railway Acts in this country, enacting that if the railway be not completed within a time specified, the charter shall be forfeited. In the present case, the defendant railway served a landowner with a notice to treat for part of his property before the period of three years limited for the exercise of its compulsory powers had expired. The landowner served a counter-notice requiring the company to take the whole property, and nothing further was done towards ascertaining the compensation. Thirteen days before the expiration of the period of five years allowed for the completion of the works, the company entered upon the land under sec. 85 of the Lands Clauses Consolidation Act of 1845, relating to the compulsory taking of land, having previously made a deposit, and given the bond required by that section. After the five years had expired without the railway

RECENT ENGLISH DECISIONS.

having been made on the land, the landowner brought this action for an injunction to restrain the company from executing works on the land, and from continuing in possession of it. The Court of Appeal held, reversing Fry, J., that the entry of the company was wrongful, and that the plaintiff was entitled to the relief asked. The Lord Chancellor says, p. 53 :—"For a company to enter under sec. 85, on the eve of the expiration of all its general powers applicable to the land on which it so enters, not for the purpose of making any statutory works under the statutory powers, but for that of acquiring a possessory title to the land against the landowner, and then making a railway over it not under the Act, but as under an ordinary landowner's title, is, in my opinion, an abuse of the Act, which can confer no right upon the company after the expiration of their powers, which they would not otherwise have possessed. The *M. R.* uses very similar language, p. 55, and then goes on to consider a further question, though unnecessary for the decision of the case, he says :—"But there is a point to which the Lord Chancellor did not refer, and as to which I desire to express my opinion, namely : supposing the entry had been rightfully made, what would have happened after the thirteen days? It appears to me, that then the right of retaining possession of the land would have come to an end. There is no right to enter, and use, except for the purposes of the Act. It is not merely entering that is authorized, it is entering and using. If the company cannot use, it seems to me that it cannot retain possession against the landowner. . . . When the time limited for making the line has expired, he (the landowner) says :—'You cannot do that for which alone you had a right to take my land, and for which alone you had a right to deprive me of the possession of my land, and your right to retain possession has therefore ceased.' It seems to me that both at law and in equity that would be an answer to any claim set up by the company to retain pos-

session of the land after the powers had ceased." Cotton, L.J., also, p. 57, expresses a similar view on this latter point, and he also observes :—"I do not say that where they (the railway) are owners of land, and can complete their railway upon it, without interfering with public rights, or with the rights of individuals, anybody, except perhaps the shareholders, or the Attorney-General could stop them from going on, and as landowners, completing their works on the land which they have already acquired under the powers of their Act."

COMPANY—BORROWING POWERS—OVER-DRAWING.

In the next case, a certain benefit building society, whose rules neither expressly authorized, nor expressly forbade the borrowing of money, were permitted by their bankers to overdraw their account to a large amount. In 1876, the directors of the society agreed that certain deeds of borrowing members which had been deposited with the bankers, were deposited not only for safe custody, but as a security for the balance from time to time due. The Court of Appeal now held that the over-drawing of the bankers' account was *ultra vires*, being a borrowing unauthorized either by the rules or the objects of the society, and no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes." Therefore, they held that the bankers had no lien on the deeds, either under the agreement or by the course of dealing with the society; nevertheless, they held that as far as it could be made out that the moneys which were advanced by the bankers, simply went to pay the legitimate debt and liabilities of the society, the bankers ought to have the benefit of their security. They refer to the "general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit, so as, in substance, to make

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those other people pay their debts," and declare that if the facts of the case gave the bankers the benefit of that equitable principle, it was consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing, should not stand in the way of the justice due to them. The consistency between the said equitable principle so applied, and the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may, they say, be shown in this way:—"The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is merely for the convenience of payment, a change of the creditor there is no substantial borrowing in the result so far as relates to the position of the company."

ADMISSIONS OF SOLICITORS.

In the above case no evidence was given as to the application of the money which was advanced by the bankers; but the solicitors on both sides signed an admission that some part was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses and expenses of mortgaged property. This court held that the admission by the solicitors of the society that some part of the money had been applied in payment of lawful expenses was sufficient to entitle the bankers to a declaration and an enquiry as to the amount so applied. They say on this point, "What is the meaning of admissions of that kind? Surely the natural interpretation of them is, that the parties intended to save the expense of going into formal evidence to lay the foundation for an inquiry or an account; and when they admit that the items, if they were looked into, would be found to divide themselves into particular classes, we think that is a sufficient foundation for directing an account."

FRAUDULENT SETTLEMENT OF LEASEHOLD—13 ELIZ. C. 5—
27 ELIZ. C. 4.

The next case, *In re Ridler, Ridler v. Ridler*, p. 74, is an interesting one. It deals with the position of a man, under 13 Eliz. c. 5, who makes a voluntary settlement, while liable under a guarantee to answer the debt of another. In 1832 R. R. gave to the W. Bank a guarantee to secure the balance due from his son R. H. R. on his banking account, to the extent of £1000. On May 25, 1877, R. H. R.'s account was overdrawn by £1,515. On that day R. R. made a voluntary settlement of a *leasehold* property, worth £200 a year, which he held at a rent of £3, 10s. His only other property was furniture worth less than £200, and a debt of £1,500 due to him from R. H. R. There was some general evidence that R. H. R. was solvent at the date of the settlement. The question was whether the settlement was void as against creditors of R. R., under 13 Eliz. c. 5. The Court of Appeal now held that it was. The Lord Chancellor delivered the principal judgment, in which Jessel, M. R., and Cotton, L. J., concurred. He said: "To hold that a guarantor can make a voluntary settlement of the whole of his property, and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened, the possibility of which the parties must have had in contemplation when the guarantee was given, of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into." Turning then to consider the state of R. R.'s own assets at the time the settlement was made, the L. C. says: "The debt due from the son cannot be looked upon as an available asset for meeting the liability on a guarantee given for the son." He held, therefore, the settlement could not

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be supported: "The father, when he made the settlement, must have known that if the son could not pay the balance to the bank, he himself, if the settlement was sustained, would have substantially nothing available to meet the liability under the guarantee but such dividend as he could get from the son's estate;" the son had gone into insolvency. The *M. R. and Cotton, L. J.*, in their judgments, discussed *Price v. Jenkins*, L. R. 5 Ch. D. 619, cited on the argument. It had been decided under 27 Eliz. c. 4, that a voluntary conveyance, though honestly and fairly made, was fraudulent as against a subsequent purchaser from the settler. *Price v. Jenkins* qualified that doctrine, and decided that the grantor's undertaking the liability for rent was sufficient to support a settlement which was open to no objection but that of being voluntary. But in the present case, the *M. R. and Cotton, L. J.*, held, that whatever may be held under 27 Eliz. c. 4, the undertaking the liability to rent is not a good consideration within 13 Eliz. c. 5. In the language of the latter learned Judge:—"A man who makes a settlement without leaving himself enough property to pay his creditors, must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration, cannot be brought within the exception in the statute by the mere fact that the grantee becomes liable for the rent."

MORTGAGE—MERGER IN JUDGMENT.

Passing by some cases on points of practice, which will be found noted among our Recent English Practice Cases, the next case to be mentioned is *Popple v. Sylvester*, p. 98. Here by a mortgage deed, securing a debt of £3000, the mortgagor covenanted to pay the £3000, with interest at seven per cent. on the day provided for payment; and, by a separate covenant, that in case the £3000 should not be paid on the day named, the defendant could, "so long as the sum of £3000, or any part thereof, should remain due on the security of the said indenture," pay interest for

the £3000, or for so much as should for the time being remain unpaid, at the rate aforesaid. On September 23, 1869, the mortgagee obtained judgment for £3145, the amount then due for principal and interest. In October, 1869, he issued a sequestration under the judgment against the defendant's property. On March 1, 1882, the sequestrator paid the plaintiff the £3145, with interest at four per cent. (the legal rate). The plaintiff now sought to recover the difference between interest on the £3000, at the rate of seven per cent., as secured by the mortgage deed, and the interest at the rate of four per cent. paid to the plaintiff by the sequestrator. The mortgagor argued that the plaintiff could not recover, because the mortgage debt was merged in the judgment. Fry, J., however, gave judgment for the plaintiff, for that although the personal covenant to pay the £3000 was extinguished by the judgment, the charge remained notwithstanding, and, therefore, the express covenant "so long as the £3000 should remain due on the security of the indenture," continued in force. "The only ambiguity," he says, "arises from the fact that part of the security is extinguished by the judgment, and part remains."

COSTS—ADMINISTRATION.

The next case, *Croggan v. Allen*, p. 101, is on the same subject as the recent case in our Chancery Division, of *Re Woodhall*, before the Divisional Court, noted 18 C. L. J. 282. Though decided before *Re Woodhall*, it was not probably reported at that time; at all events, it does not appear to have been cited on that occasion. In both cases the ruling of Lord Westbury in *Bartlett v. Wood*, 9 W. R. 817, is cited, and followed by the Court, namely, that no costs should be given out of the estate in administration proceedings, unless it appears that the litigation has been in its origin directed with some show of reason, and a proper foundation for the benefit of the estate, or has in its result conducted to that benefit. In *Re Woodhall*, however, the proceed-

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ings being held unnecessary, and Proudfoot, J., having directed that the plaintiff should be deprived of her share of the costs, and should pay the rest of the costs, the Divisional Court upheld this order on appeal. In *Croggan v. Allen*, the proceedings for administration were also held to be unnecessary. Fry, J., says:—"I disallow the plaintiff's costs of the action. I have felt strongly inclined to go further, and to require the plaintiff to pay the whole costs of the action, but I think if I were to do so, I should be going beyond what is the ordinary practice of the Court; but with regard to the costs occasioned by the most idle proceeding insisted upon by the plaintiff, namely, the rendering the income account, I direct that all costs with respect to the income account, be paid by the plaintiff."

VENDOR AND PURCHASER—DEFECT IN TITLE.

The next case, *Brewer v. Broadwood*, p. 105, may be briefly noted. A vendor contracted to sell, and a purchaser to purchase an agreement for a lease. The purchase afterwards repudiated the contract. At the date of the agreement and of the repudiation, the agreement to leave was voidable at the will of a third party, but the third party took no steps to avoid the agreement, but was willing to confirm it on certain conditions. Fry, J., held that the purchaser was entitled to repudiate. He says:—"The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shown, either from the surrounding circumstances, or by direct evidence, that the intention of the agreement is to sell only such interest, if any, as the vendor may have; and in such a case as that, the purchaser has no right to require a title to be shewn by the vendor; but in the absence of such evidence, the view which I take of such an agreement is, that it requires the vendor to show that he has a title to a valid agreement. . . . I hold that the vendor is bound to show that there is a subsisting valid agreement to lease."

WILLS.

The next case, *Re Featherstone's Trusts*, p. 111, shows the care that should be taken with regard to the grammatical construction of the language used in wills. W. Featherstone, by his will in 1869, gave all his real estate in the County of York to trustees upon trusts to sell, the proceeds to be subject to the disposition of his residuary personal estate, and he gave the residue of his personal estate to the same trustees upon trust to pay certain legacies, and subject thereto "rents and equally amongst all the children of J. D. and the said R. A., and I direct that the same shall be vested legacies at the time of my decease." Kay, J., held (i), citing authorities that, on the grammatical construction of the above words, and in the absence of anything in the will overruling the construction, they meant that R. A. was to take with the children of J. D., and hence, R. A. having died, leaving children, in the testator's lifetime, his children took nothing; for, as he pointed out, on the proper grammatical construction of the words used, it would be necessary, in order to enable the children of R. A. to take, to insert the word "of," so that it should read "of J. D. and of the said R. A."; (ii) that the concluding words of the above residuary gift must be taken to mean that the whole residue should be divided amongst such only of the residuary legatee as should survive the testator.

SETTLED ESTATE—EFFECTUATING LIFE TENANT'S CONTRACT FOR LEASE.

The last case in this number of the *Law Reports* is *Davis v. Harford*, p. 128. Here a point arose which Chitty, J., pronounced to be a simple one, though not covered by direct authority. By a will devising real estate in strict settlement, powers of granting building leases were given to any tenant for life and to trustees during the minority of any tenant in tail. The tenant for life, in pursuance of his power, entered into a contract to grant a building lease, but died without having executed a lease, and was succeeded by an infant tenant in tail. Chitty, J., held that the trus-

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tees had power to effectuate the contract of the tenant for life by executiug a lease. He said: "Supposing the agreement had not been for a lease in accordance with the power it would have been otherwise; but since all parties under the settlement are bound by the equitable contract so as to pass to the lessee the equitable interest, I am of opinion that the persons who have a power sufficient to vest the legal estate are authorized by the power to execute a deed necessary for that purpose."

A. H. F. L.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. P.]

[Feb. 6.]

MCMASTER V. GARLAND.

Equitable assignment of goods—Seizure by sheriff.

The judgment in this case, as reported 31 C. P. 320, affirmed, ARMOUR, J., dissenting, who thought that although the transactions as set forth had effected good equitable assignments of the *proceeds* of the goods when sold by S. S. & Co. the *legal* right thereto, subject to the liens on the sum to be realized by the sale, still remained in Brennan, and therefore were exigible under a *fi. fa.* against him in the hands of the sheriff, who would hold the moneys arising from a sale thereof for the benefit of the execution creditors, after first paying off the orders given by Brennan on S. S. & Co.

McCarthy, Q.C., and Clements, for appellent.

J. K. Kerr, Q.C., and Allan Cassels, for respondent.

From Chy.]

[Feb. 6.]

BADENACH V. SLATER.

Deed of Assignment—Payment of trustee.

By a deed of assignment made avowedly for the benefit of creditors, it was provided that the

trustee should be paid for his services, and that he should be liable for "wilful default or neglect" only, but made no provision for the payment of privileged liens in full or any equitable valuation of securities held by creditors on the estate of the assignors, and authorized the trustee to sell the real and personal property assigned by auction or private sale, or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of the deed.

Held [affirming the judgment of the Court below,] that the deed could not be impeached as a fraudulent preference of creditors within the Act, R. S. O. ch. 118.

Gibbons, for appellant.

Foster, for respondent.

From C. P.]

[Feb. 6.]

HEDSTROM V. THE TORONTO CAR WHEEL CO.

Contract for particular brand of iron.

The judgment in the case, reported 31 C. P. 475, affirmed on appeal with costs.

Bigelow, for appellant.

G. Kerr and Akers, for respondent.

From Q. B.]

[Feb. 6.]

CRATHERN V. BELLI.

Promissory notes, undertaking to pay part of

The judgment of the Court of Queen's Bench, reported 46 U. C. R. 365, affirmed on appeal.

Bethune, Q.C., for the appeal.

Delamere, contra.

From Blake, V.C.]

[Feb. 6.]

STAMMERS V. O'DONOHUE.

Specific performance—Contract evidenced by letters.

The decree of BLAKE, V.C., reported 28 Gr. 207, affirmed on appeal.

O'Donohoe, Q.C., for appeal.

J. Bain, contra.

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[Ct. of App.]

From Proudfoot, V.C.]

[Feb. 6.

GOODERHAM V. TORONTO AND NIPISSING
RAILWAY CO.

Receiver, payments by—Accounts.

A receiver of a railway having been appointed, who after paying the working expenses of the road was directed to pay any balance remaining in his hands periodically into Court, and an account having been directed of all liens, charges and incumbrances existing on the undertaking, and the moneys so paid into Court having been ordered to be applied in payment of such liens, etc., according to priority.

Held, [affirming the ruling of PROUDFOOT, V.C.] that in taking such account the receiver should have been allowed for all payments made on account of working expenses, which were not payable until after his appointment, but not those past due at that time; these being payable out of the moneys directed to be paid into Court.

MacLennan, Q.C., and *Kingsford*, for appellant.

R. M. Wells, and *W. Cassels*, for respondents.

From Proudfoot, V.C.]

[Feb. 6.

CANADA LANDED CREDIT CO. V. THOMPSON.

New trial—Conflict of evidence—Erroneous view of law.

Where there was a conflict of evidence, and the learned judge who tried the case attributed greater weight to the evidence of some witnesses than to that of others, but in the opinion of this Court took an erroneous view of the law, this Court refused to make a decree upon the mere perusal of the evidence, and remitted the case to the Court below for a new trial.

McCarthy and *Creelman*, for the appellant.

W. Cassels, for the respondents.

From Div. Ct. Leeds and Grenville.]

[Feb. 6.

WILTIE V. WARD.

Claim ascertained by signature—Division Courts Act, 1880.

By the Division Courts Act, 1880, the Division Courts have jurisdiction in actions for debt where the same does not exceed \$200, and the amount or original amount is ascertained by the

signature of the defendant. In this case the claim was upon the following document: "Received from R. W. an order for C. B., ordering me to pay him the sum of \$140, which is accepted on the following conditions, providing he carries out his agreement with me as cheese-maker. (Signed), M. W."

Held, that the Division Court had no jurisdiction, because the writing did not ascertain the amount, inasmuch as it depended upon the happening of certain events with respect to which evidence had to be adduced.

George Macdonald, for the appellant.

Falconbridge, for the respondent.

From C. P.]

Feb. 6.

DEVANNEY V. BROWNLEE.

Promissory note—Accommodation maker—Principal and surety—Renewal—Discharge of surety.

A married woman signed a note in blank, and gave it to her son "to be used as he liked." He filled it up for \$1200, signed it, and transferred it to the plaintiff, who was not made aware of the circumstances under which it had been signed. It was renewed twice without the married woman's name, the original note remaining in the plaintiff's hands.

Held, [reversing the judgment of the Court below], that the married woman was a surety in respect of the note for her son, and that the authority to the son as to using the note, did not extend to keeping it afloat after maturity without her knowledge, and that she had been discharged by the extension of the time for payment.

McClive, for the appellant.

Bethune, Q.C., for the respondent.

From Spragge, C.]

[Feb. 9.

SMITH V. THE MERCHANTS' BANK.

Warehouse receipts—Banks.

Held, on appeal, [reversing the decree as reported, 28 Gr. 629,] that to bring a transaction within section 46 of the Dominion Banking Act of 1871 (34 Vict. ch. 5) there must be three persons concerned therein—the owner of the goods, some person filling the position of a keeper of a wharf, yard or other place, and the

bank; and it is from the holder of the warehouse receipt therein referred to that the bank is allowed to acquire the document in security on certain conditions for advances.

MacLennan, Q.C., and *Kingsford*, for the appellant.

Robinson, Q.C., and *J. F. Smith*, for the respondents.

From C.P.]

[Feb. 19.

QUINLAN v. THE UNION FIRE INS. CO.

Fire Insurance—Diagram and report by agent.

By an addition to the second statutory condition on the policies of the defendant company it was provided that "such application or any survey or description of the property to be referred to herein shall be considered a part of this policy, and every part of it a warranty by the assured; but this company will not dispute the correctness of any diagram or plan prepared by its agent, from a personal inspection," and by a variation of another condition it was provided that if any agent of the company took "part in the preparation of this insurance he shall, with the exception above provided for of a diagram or plan, be regarded in that work as the agent of the applicant." In the application prepared and signed by the agent the existence of a small building, used for storing coal oil, had not been mentioned as required by the company, neither was any reference made to it in the diagram prepared by the agent, who passed the premises daily and was quite familiar with the state of the property, and which was prepared by him from inspections made on previous applications.

Held, [reversing the judgment of the Common Pleas, 31 C. P. 618,] that the company was not at liberty to set this up as a defence, and judgment was ordered to be entered up for the full amount of the policies; and, per ARMOUR, J., interest should be allowed thereon to be computed from the date of the verdict being rendered.

Bethune, Q.C., and *Dixon*, for the appellant.

McCarthy, Q.C., and *A. Gall*, for respondent.

QUEEN'S BENCH DIVISION.

IN BANCO.

REG. EX REL. NASMITH v. TORONTO.

By-law—A seizure of bread—Stamping loaf.

A by-law enacting that bread shall be of a given weight, which shall be stamped on the loaves sold, and that all bread sold not complying with such by-law shall be seized and forfeited, is good.

Rose, Q.C., for relator.

McWilliams, contra.

VOGEL v. G. T. RAILWAY CO.

Railway Act, 1879—Live stock—Special conditions—Owner's risk—Loss by negligenc.

Plaintiff shipped cattle on defendant's railway, subject to the conditions of a bill of lading, which specified that live stock were at owner's risk of loss, etc., in loading or unloading, or otherwise. . . Live stock carried by special contract only. The cattle having been lost by defendants' negligence,

Held, that defendants were liable, notwithstanding their conditions, for by 42 Vict. ch. 9, sec. 25, sub-sec. 4, their liability was expressly provided for.

Dickson, Q.C., for plaintiff.

Bethune, Q.C., contra.

MILLOR v. HAMILTON AND WIFE.

Mortgagor and Mortgagee—Statutes of Limitations—Acknowledgement—Insolvent Act of 1864—Trustee and c. q. t.—Possession of husband and wife.

A being seized of land subject to a mortgage to L. dated 14th October, 1863, and to one to M. dated 12th January, 1864, made an assignment to W. on 22nd November, 1866, under the Insolvent Act of 1864. On 28th January, 1868, he obtained his discharge. On 27th January, 1869, he obtained from M. an assignment of M.'s mortgage; and on 3rd May, 1869, he made a conveyance under the power of sale in this mortgage to F. H. to the use of his (the grantor's) wife, his co-defendant, the consideration mentioned being \$250, which was credited on the mortgage.

On 12th April, 1869, L. assigned his mortgage to M. B., who, on 25th March, 1873, as-

signed it to W. In 1879, H. having procured assignments to himself of most of the claims against his insolvent estate, presented a petition, signed by himself, to compel W. to wind it up. He alleged that M. B. held the L. mortgage in trust for the estate, and asked to have the estate realized and distributed among the creditors. A sale was accordingly had on 20th April, 1880, of all the right, title and interest of the insolvent in the land, and the advertisement further stated that the purchaser would acquire only such title as the vendor had as assignee. A. attended at the sale, and objected to the sale of the land, and bid for the same, but the plaintiff became the purchaser, and took a conveyance from W. on 4th February, 1881. Most of the purchase money went to H. as assignee to the claims against the estate. H. and his wife had remained in undisturbed possession since his discharge in insolvency.

Held, [reversing the decision of OSLER, J.], that upon the evidence set out below, the possession of H. and his wife must be considered to have been the possession of H. That the title of the first mortgagee was not extinguished, and that defendants were estopped by their conduct from disputing the plaintiff's title.

Bethune, Q.C., for plaintiff.

Beaty, Q.C., and *Allan Cassels*, contra.

IN RE WILSON V. MCGUIRE.

Constitutional Law—Local Courts Act—County Court Districts—Validity of Act respecting—Jurisdiction of Division Court Judge without his own county—Prohibition.

Pursuant to the Local Courts Act, R. S. O. cap. 42, ss. 16 *et seq.*, the Counties of Middlesex and Lambton were proclaimed by the Lieutenant-Governor as a County Court District. By section 17, in such a district the several County Courts, Division Courts, etc., shall be held by the Judges in the district in rotation. By the Division Courts Act, R. S. O. cap. 47, sec. 19, the Division Courts shall be presided over by the County Court Judges in their respective Counties. An order for the committal of the defendant was made by the Judge of the County Court of the County of Lambton, sitting in a Division Court in the County of Middlesex, under the provisions of the Local Courts Act. A

motion for a prohibition was made on the ground that that enactment was *ultra vires*.

Held, [ARMOUR, J., dissenting], that the Legislature of Ontario having complete power over the Division Courts as to their existence and constitution, had the right, also, to appoint officers to preside over them: and, therefore, that the Local Courts Act, R. S. O. ch. 42, sec. 16, *et seq.*, by which several counties may be grouped, and the Division Courts in each group be held by the Judges of the different counties forming such group in rotation, were not *ultra vires* as regarded such courts.

Where the County Judge of the County of Lambton, holding a Division Court in the County of Middlesex under this Act, made an order to commit a defendant for not attending to be examined,

Held, that such order was authorized, and a prohibition was refused.

Per ARMOUR, J.—The effect of the statute is to appoint the County Court Judge of one County to be a County Court Judge of another County, which is beyond the power of the Legislature; and *semble*, that they have no power to appoint Division Court Judges either.

Bethune, Q.C., for application.

Irving, Q.C., contra.

LETT (ADMINISTRATOR) V. ST. LAWRENCE AND OTTAWA RAILWAY CO.

HINTON V. ST. LAWRENCE AND OTTAWA RAILWAY CO.

Lord Campbell's Act—Death of wife—Husband's right of action—Pecuniary damages—Collision at crossing—Proof of negligence.

The plaintiff sued under Lord Campbell's Act, on behalf of himself and children, for the death of his wife occasioned by the defendants. The wife had some separate estate from which she derived an income, but the jury allowed no damages in respect thereof. It was not shown that the wife afforded any pecuniary assistance either to the husband or her children. The jury found for the plaintiff, and apportioned the damages amongst the plaintiff and some of his children.

Held, [ARMOUR, J., dissenting], that the verdict was wrong; for the plaintiff was not entitled either for himself or the children, to recover compensation for anything but pecuniary loss,

or the loss of a reasonable probability of pecuniary benefit.

Per ARMOUR, J.—The loss to be compensated is the loss of some benefit or advantage capable of being estimated in money, so distinguished from a *solatium* for wounded feelings and loss of companionship, and the loss to the husband of the wife's performance of her household duties, and to the children of a mother's education, and both are losses which can be estimated by a jury.

Per ARMOUR, J.—The jury were rightly directed under the facts stated below, that the defendants had laid down the track on which the accident happened, in the City of Ottawa, without authority, it being a third track or switch for use in connection with their railway, for purposes of shunting, etc. And if illegally laid down, no acquiescence, except by by-law, would make it rightful as against the public.

Per HAGARTY, C. J.—Having been there for many years with the knowledge and acquiescence of the Corporation, its existence could not alone make defendants liable; but it was very properly brought as a circumstance to be considered by the jury.

A judge is not bound, under the Judicature Act, to submit questions in writing to the jury.

The train was backing at the time.

Per ARMOUR, J.—The jury were rightly directed that defendants were bound to sound the whistle or ring the bell, when the nearest part of the train was eighty rods from the crossing, and having regard to the fact that they had without authority increased the number of tracks there. it was also right to tell them that it was for them to say whether, considering the nature of the crossing, they should not have stationed a man there, or taken some other than the statutory precaution.

McCarthy, Q.C., for plaintiff.

Bethune, Q.C., contra.

CHANCERY DIVISION.

Boyd, C.]

[Feb. 14.

RE KIRKPATRICK; KIRKPATRICK v.
STEVENSON.

Executors—Statute of Limitations.

Appeal from the Master. John Kirkpatrick

died June 18th, 1860. This was a claim by one of two residuary legatees under his will, who were also his executors, against his co-executor, for half the residue of the estate of the said John Kirkpatrick. It appeared that the residue was ascertained, or could have been ascertained, within a year from the testator's death. By arrangement between the executors, the one now in default got in all the outstanding assets, under an agreement, as it was said, by which he was to divide with the other, and remit a moiety when the sums collected amounted to a certain aggregate.

Held, for what was so collected antecedent to ten years before the presentation of the claim, the bar of the Statute (R. S. O., c. 108, sect. 23) applied; but as to all sums got in by the acting executor, within ten years from the making of the present claim, the claimant was entitled to recover. And the objection that the residue was not precisely, and for all purposes ascertained, because the fund in the hands of the acting executor had been from time to time drawn upon to make good deficiencies in the general legacies, did not operate to exempt the claimant from the bar of the Statute; neither was it correct to say that the acting executor was a trustee of the moiety of the moneys collected by him, and that the Statute was no bar in such a case. *Quoad* the money collected the acting executor had no duty to perform as trustee for the other executor, neither had he any such duty as owner in common of the residuary estate. His receipt of the whole made him a debtor to the other, and the alleged arrangement between them did not carry the matter any higher. *Crawford v. Crawford*, 16 W.R., 412, per Christian, L.J., approved of and followed. *Burdick v. Garrick*, L. R. 5, Ch. 233, distinguished.

The authorities show, notwithstanding a contrary opinion expressed by Romilly, M.R., in *Reed v. Fen*, 35 L.J., Ch., N.S., 464, that the Statute applies, not only to assets distributed by the personal representative, but also to assets retained by him.

D. McCarthy, Q.C., and *T. S. Plumb*, for the claimant, (appellant).

J. MacLennan, Q.C., contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Divisional Court.]

[Feb. 15.]

BLACK v. STRICKLAND.

Bills of exchange—Special endorsement—Negotiability.

The possession of bills by the endorser, after he has specially endorsed them, is *prima facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no re-indorsement; so that by the possession he is remitted to his original rights.

On July 25th, 1877, W. drew a bill of exchange on the defendants, payable to his own order at sixty days, which they accepted. This note was first endorsed "pay to the order of the Bank of Ottawa"; the Bank of Ottawa specially endorsed it for collection to the Bank of Commerce. The bill was dishonoured and protested, and came again into the hands of the Bank of Ottawa, who returned it to W. on or before December, 1877. It afterwards, how did not clearly appear, got back into the hands of the Bank of Ottawa. In 1881, the plaintiff, who was W.'s agent, got it from the Bank of Ottawa, along with other papers of W. W. then endorsed it to the plaintiff, in Nov. 1881. The plaintiff now sued the acceptors of the bill.

When produced the bill appeared with the special endorsements all struck out, and leaving only the signature of W. to the first special endorsements, and with the last special endorsement to the order of the plaintiff. There was no re-endorsement from the Bank of Ottawa to W. or the plaintiff.

Held, [reversing FERGUSON, J., who had nonsuited the plaintiff,] in the absence of other evidence, it was to be inferred that W. satisfied any claim of the Bank of Ottawa, "took up" the bill, and thereby procured or had the right to make the cancellation of the previous special endorsements. Thus the objects for which the bill had been endorsed to the Bank were satisfied, and the special endorsements became inoperative upon the return of the instrument. The mere handing it back was enough, in these circumstances, to make W. the legal holder with the right to re-endorse to the plaintiff, for the authorities show that, whether the Bank of Ottawa returned the bill to W. because their claim on it, as discounters, was satisfied, or whether it was not discounted by the Bank, but merely left with them by W. for collection; in

either case, when it came back to W., he was remitted to his original rights against the acceptor.

Callow v. Lawrence, 3 M. and S. 95, cited and followed.

Wells, for the plaintiff.

S. H. Blake, Q.C., for the defendants.

Divisional Court.]

[Feb. 15.]

DOVEY v. IRWIN.

Pleadings—Admissions in answer.

Where a defendant admits any of the allegations in the plaintiff's bill, the whole of the admission should be looked at according to the rule in *Reade v. Whitchurch*, 3 Sim. 562; that the sense and not merely the grammatical construction or form is to be regarded as the criterion of the extent and scope of the admission.

When A. sued for a wrongful conversion of certain timber by the defendant, setting out an agreement made by him and B. with the defendants, under which they agreed to deliver certain timber to the defendants, and alleged that B. was only a surety in respect of the said agreement, and that no timber had been delivered under the said agreement, but the defendants wrongfully made a seizure of some of the plaintiffs' timber; and the defendants admitted in their answer that they took possession temporarily of certain timber, the joint property of the plaintiff and B. (who was a defendant), and that before they took permanent possession of such joint property, they agreed with B. for a reduction of the price by an agreement which he had the power to make, and under which they acted.

Held, not such an admission as entitled the plaintiff to a decree, for the onus still rested on the plaintiff to prove himself the sole owner of the timber, and that he had a cause of action in thus suing alone, after which the onus would shift to the defendants to prove their defence.

Hector Cameron, Q.C., for the appeal.

S. H. Blake, Q.C., contra.

Divisional Court.]

[Feb. 15.]

CHURCH v. FULLER.

Costs—Jurisdiction.

Whatever may be the rule in England, this Court has maintained the jurisdiction to make a defendant pay costs in a suit for specific per-

formance, though the bill be dismissed, if the circumstances be such as to warrant doing this.

Hence, in this suit brought for specific performance of an alleged agreement for the sale of lands by the purchaser against the vendors and a subsequent purchaser, where the judge of first instance had dismissed the bill without costs, but gave the defendant purchaser his costs against defendants, the vendors,

Held, the judge had jurisdiction to make such order, and, he having such jurisdiction, the making of it was within his discretion, and he having exercised it, the Court ought not to interfere.

McMahon v. Barnes (1858, Order Book No. 9, fol. 730), not reported, followed.

J. MacLennan, Q.C., for defendant Gebbie.

Proudfoot, J.]

[Feb. 20.]

FLANDERS V. D'EVELYN.

Infants—Foreign guardian.

In this action a guardian appointed by one of the Probate Courts of Minnesota, sought to recover legacies bequeathed to three infant children.

Held, on analogy of rule laid down in *Blake v. Blake*, 2 Sch. and Lef. 25, and *Mitchell v. Richey*, 13 Gr. 446, with reference to testamentary guardians, and guardians appointed by our Surrogate Court respectively, (than whom a guardian under the statutes of Minnesota, appeared on the evidence to have no greater powers or duties), that the money must be paid into Court, and could not be ordered to be paid to the foreign guardian.

Semble, the rule might be modified if the sum were small, and the whole, or nearly the whole were required for the infants' education and maintenance, or other immediate care.

PRACTICE CASES.

Mr. Dalton.]

[Dec. 8, 1882.]

POUCHER V. DONOVAN.

Attachment—Reference.

The plaintiff in an action under the Mechanics' Lien Act, obtained a reference to ascertain the amount of his claim.

Pending the reference, one Withrow, an execution creditor of the plaintiff's, for a deficiency after sale of lands in a mortgage suit, applied for an order to attach such sum as might be found due on the reference.

The plaintiff alleged fraud in the mortgage sale and proceedings, and sought relief by way of cross motion under the O. J. A.

The Master in Chambers made an order attaching the amount, if any, that should be found due on the reference.

Moffatt, for the application.

Rae, for the plaintiff.

Caddick, for the defendant.

Mr. Dalton.]

[Feb. 14.]

LEONARD V. KEONAND.

Alimony—Costs.

The plaintiff in a suit for alimony, returned to her husband pending a motion for interim alimony.

Held, that her solicitor was entitled to costs between solicitor and client against the husband

J. Macgregor, for plaintiff.

Badgerow, for defendant.

HOLMESTED V. VANDERBOGART.

Action by accountant—Mortgage suit—Proof of claim.

In an action for sale or foreclosure brought by the Accountant of the Supreme Court to enforce payment of a mortgage vested in him as such accountant, where no defence has been put in, it is not necessary for the accountant to make affidavit in proof of the claim in the Master's Office, but the Master is justified in proceeding on the certificate of the accountant certifying the amount appearing to be in arrear according to his books, and that he has not been in possession of the mortgaged premises.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

MASTER'S OFFICE. — COUNTY OF ONTARIO.

ENGLISH V. GLEN.

Postponement of sale—Application for—Practice.

An application to postpone a sale must be made promptly and on notice, and such application must be made to the Court or a Judge, and not to the Master who settled the advertisements.

(Whitby.—DARTNELL, J.J.)

The solicitor for the owner of the equity of redemption, two days before the day appointed for sale, applied to the Master at Whitby for a postponement. No affidavits were filed, but the vendor's solicitor appeared and did not object; but the solicitors for a mesne incumbrancer strongly objected.

THE MASTER AT WHITBY.—I do not think I have any authority to grant this application. I think it should be made to a Judge in Chambers, and should have been made on notice promptly, and on affidavits or papers previously filed. A very weighty case indeed must be made for postponement. The policy of the Court is to give every confidence to intending purchasers at a sale conducted under its auspices. In this case it is alleged that it is probable that bidders, or parties interested, living in the United States will be present, and it would be impossible, in the time, for any notification to reach them, much less the general public. The vendors, after opening the sale, might postpone it for sufficient reasons; for example, should there be no bidders, but (particularly where a mesne creditor objects) a vendor's solicitor should be cautious in withdrawing the property from sale. He is an officer of the Court, amenable to its discipline, and, to a certain extent, is a trustee and guardian, not only of the plaintiff's interests, but those of other parties to the suit. On both grounds I decline to direct any postponement, and the sale must go on.

RECENT ENGLISH PRACTICE CASES

D'HORMUS-GEE & CO. V. GREY.

Imp. O. 16, r. 1—Ont. Rule 89—Security for costs—Joint and separate claim.

(L. R. 10 Q. B. D. 13.)

The above rule makes no alteration in the practice as regards security for costs, so as to alter the law, as it existed before the Judicature Acts, that where one of two joint plaintiffs is a foreigner out of the jurisdiction, yet if the other resides within the jurisdiction there can be no order for security for costs.

Per MANISTY, J., *Umfreville v. Jackson*, L. R. 10 Ch. 580, seems precisely in point.

[NOTE.—*The Imperial and Ontario rules are virtually identical.*]

RE EAGER, EAGER V. JOHNSTONE.

Imp. O. 11, r. 1—Ont. rule 45—Service of writ out of jurisdiction.

(L. R. 22 Ch. D. 86.)

No leave to serve a defendant out of the jurisdiction can be given except in the cases specified in the above rule.

Per JESSEL, M.R., "The new rule is exhaustive; the old practice is no longer applicable. This case is admitted not to be within the rule, therefore we cannot order service."

[NOTE.—*The Imperial and Ontario rules are virtually identical.*]

EATON V. STORER.

Imp. O. 24, r. 1, O. 57, r. 6—Ont. rules 173, 462—Leave to deliver reply after time.

(L. R. 2 Ch. D. 91.)

The time for delivering a reply, which would have expired on July 25th, was extended to August 22nd, and then to September 19th. On September 26th no reply having been delivered the defendant served notice of motion for judgment. On the same day the plaintiff, by leave of the judge, served notice of motion for the following day for leave to deliver a reply, and on the 27th the judge refused the plaintiff's motion on the ground of unexplained delay.

Held, on appeal, the application ought to have been granted on the terms of the plaintiff's paying the costs of it.

CORRESPONDENCE.

Per JESSEL, M. R., According to the usual practice of the Court the plaintiff's application ought to have been granted. The plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs, which is a sufficient punishment and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstance such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till July 25th.

[NOTE.—*The Imperial and Ontario rules are identical.*]

IN RE MILAN TRAMWAYS COMPANY.

Imp. O. 19, r. 3 — Ont. rule 128 — Set off — Counter-claim.

L. R. 22 Ch. D. 121.

Per KAY, J., "In my opinion this rule was not intended to give rights against third persons which did not exist before, but it is a rule of procedure designed to prevent the necessity of bringing a cross-action in all cases where the counter-claim may conveniently be tried in the original action."

[NOTE.—*The Imperial and Ontario rules are identical.*]

CORRESPONDENCE.

Signing Judgments in Div. Courts under O. J. A.

To the Editor of the LAW JOURNAL.

SIR,—In the number of your valuable journal of the 15th instant, you published a report of Judge Clarke in the case of *Burk v. Brittain*, where he holds that he may, by virtue of section 244 of the Division Court's Act and rule 80 O. J. A., grant an order empowering the plaintiff to sign judgment without a formal trial of the action in cases commenced in the Division Court by special summons. In an editorial notice of the judgment, you refer to the case of *Willing v. Elliott*, which you will find fully reported in 37 U. C. Q. B. 320. I acted for the plaintiff in this case of *Burk v. Brittain*, and on the strength of my success applied to the Judge

of the County Court at Lindsay, for a summons calling on the defendant to show cause why the plaintiff should not have leave to sign final judgment in a case of *Conan v. McQuade* on the same material as in the former case, by a certified copy of all the proceedings in the cause, and an affidavit as provided by Rule 80, O. J. A. made by the plaintiff; but the Judge refused the summons. In this latter case the action was on a note made by the defendant, and commenced by special summons. The learned Judge, in refusing the summons, did not deliver a written judgment, but said that while he considered that under the authority of *Fletcher v. Noble*, ante vol. 18, p. 371, he had the power by virtue of sec. 244 of the Division Court Act, to grant this summons, still it was a matter of discretion, and he did not think it a proper case to call forth the exercise of that discretion. He thought that in many cases it might work injustice to a defendant who could successfully oppose such an application, as he would be put to costs in employing a solicitor to prepare affidavits, &c., which could not be given back to him in any way that he was aware of. Witness fees and expenses might be allowed him in case he defended in person and came to the county town to oppose; but the usual way of defending such a motion, namely, by affidavits and counsel, would be entirely lost. For the purpose then of laying down a principle to apply to all cases which might result in many ways, he deemed it not expedient to grant the summons.

Yours truly,

D. BURKE SIMPSON.

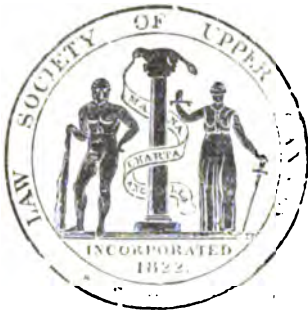
Bowmanville, Feb. 19th, 1883.

Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance by the conductor before midnight of that day, although the journey is not completed until the next morning, will be held to be a compliance with the condition.

Where a railway ticket binds a passenger to a continuous journey, he is not bound to commence his journey at the starting point named in the ticket, but may enter the train at any intermediate station on the route.—*Auerbach v. New York Central, R. Co.*, (*Am. Law Reg.*, Dec. 1882.)

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely :—

William Renwick Riddell, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degree, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks,

From	Arithmetic.
1882	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum.
1883.	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
	Virgil, Æneid, B. V., vv. 1-361.
1884.	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
1885.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations ; Euclid, Bb. I., II. & III.

ENGLISH

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to *Cantos* V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

Canada Law Journal.

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No. 6.

DIARY FOR MARCH.

- 17. Sat. . . . St. Patrick's Day.
- 18. Sun. . . . *Palm Sunday.*
- 23. Fri. . . . Good Friday. Sir George Arthur, Lieut.-Gov.
U. C., 1838.
- 25. Sun. . . . *Easter Sunday.*
- 26. Mon. . . . Easter Monday.
- 28. Wed. . . . Canada ceded to France, 1632.
- 29. Thurs. . . . The Wills Act assented to, 1873.
- 30. Fri. . . . B. N. A. Act assented to, 1867.
- 31. Sat. . . . Lord Metcalfe, Gov.-Gen., 1834.

TORONTO, MARCH 15, 1883.

THE weekly notes for Feb. 10th, 1883, contain the new English Lunacy Orders. The previous General Orders in Lunacy are discharged, and the Lunacy Orders, 1883, substituted therefor.

THE rumour that Mr. Benjamin, Q.C., is about to accept a judgeship is an interesting one. The bar in England would no doubt cordially welcome so brilliant an addition to the bench, and the selection of one who had been an American citizen for so distinguished a position would be another illustration of the cordial feeling that now exists between the two great branches of our race.

WE notice in *Weekly Notes*, 1883, p. 6, that the case of *Sutton v. Sutton*, on which we commented in our number of Feb 15th ult. last, has since been followed in the case of *Fearnsider v. Flint*. There a mortgage debt was secured by a collateral bond of the same date as the mortgage. No interest on the debt had been paid since 1847, and the last acknowledgement of the debt was given in 1862. Proceedings to enforce the bond were taken more than twelve years after the acknowledgment. Fry, J., held that the remedy

upon the bond was barred, as well as the remedy against the land.

WE have by accidental good fortune caught a glimpse of the first volume of decisions under the British North America Act, apparently compiled by Mr. John Cartwright, under the direction and solely for the use of the local government. It seems a pity if the profession in general are not to be allowed an opportunity of purchasing this compilation. At present, however, it appears to be inaccessible to the general public. It is an excellent idea collecting the cases from the various reports, and especially so as regards the cases in the various Provincial Courts, and many would be glad to have the authorities for our constitutional law in such a convenient form. The first volume which is already "out" for those who can get it, contains the reports of decisions in the Privy Council, the Supreme Court, and the Superior Courts of Ontario.

THE liability of trade protection societies for representations made by them to their customers, with reference to the commercial standing of persons, concerning whom information is sought, was recently considered in England by the Divisional Court of the Queen's Bench Division, in the case of *Tarling v. Cooper*, (*Law Times* for 30th Dec., 1882, p. 161), W. N. 1882, 187. The action was brought to recover damages against a mercantile agency for negligence in supplying information as to the status, respectability, and solvency of a trader. The information was furnished on a report which stated, "the information is obtained from the best sources available, and is given in confidence, but no

ESCHEAT.

responsibility is undertaken on account thereof." The jury having found negligence in not communicating the existence of a bill of sale, gave a verdict for the plaintiff; and upon a motion for a new trial, the Court held that notwithstanding the condition against responsibility, the defendants were liable for negligence in omitting to obtain the information from the best sources available. In *McLean v. Dun*, 39 U.C.R. 551; 1 App. R. 153, a similar question was raised, but the plaintiff failed on the ground that the representations made by defendants were not in writing, signed by them, as required by R. S. O., c. 117, s. 9, and, therefore, the defendants were not liable for any damages resulting from the falsity of the information furnished.

The rule to be drawn from these cases appears to be that in order to entitle a party to recover damages for misrepresentations of this kind, they must be in writing, and signed by the party to be charged; and that a stipulation against responsibility for the information furnished, will not protect the party furnishing it, from liability for damages occasioned by actual negligence on his part.

ESCHEAT.

SIMPSON V. CORBETT.

The recent case of *Simpson v. Corbett*, noted in our last number at p. 59, is another contribution to the law of Escheat. The circumstances of the case are curious. A person of the name of Charles Munroe died in the year 1869, entitled to real and personal estate, which he devised and bequeathed, subject to the payment of his debts, to his two illegitimate infant children, Duncan and Ellen, with a proviso that in the event of either dying, the share of the deceased should go to the survivor. The real estate at the testator's death was subject to a mortgage to one Williams. Mr. Corbett, the defendant in *Simpson v. Corbett*, was named the

sole executor and guardian of the infant devisees. Both Ellen and Duncan died without issue, Duncan having died last. After the death of Duncan, Mr. Corbett paid the amount due on the mortgage, and took a conveyance of the mortgaged lands from the mortgagee to himself in fee. Simpson then obtained from the Ontario Government a grant of the escheated estate, real and personal, of Duncan, and then as such grantee obtained letters of administration to Duncan's estate, and brought the action against Corbett for an account of his dealings as executor and trustee of the estate of Charles Munroe, and for a declaration that subject to the claims, if any, of Charles Munroe's estate, Corbett was a trustee for the estate of Duncan of the mortgaged estate and debt, and of all other gains and profits which had accrued to him by virtue of his executorship. The action was resisted on the ground that Corbett had acquired an absolute, irredeemable title to the mortgaged estate by virtue of the conveyance from Williams, and that the grant from the Ontario Government to the plaintiff was invalid according to the decision in the *Attorney-General v. Mercer*, 5 S.C.R. 538.

But Mr. Justice Ferguson, before whom the case was tried, granted the relief prayed on the ground that the plaintiff as administrator was entitled to an account, irrespective of the question whether his claim to the beneficial interest in the estate as grantee of the Provincial Government was good or bad, and that therefore the case was unaffected by *Attorney-General v. Mercer*.

The learned judge seems to have come to the conclusion, though we do not find this point expressly mentioned in his judgment, that the defendant Corbett, by paying off the mortgage debt, or as the defendant put it, buying the mortgaged lands at a price equal to the mortgage debt, and taking a conveyance of the mortgaged lands to himself, had effected a species of equitable conversion of the latter into personalty, and that it was as personalty in his hands, liable to be accounted

ESCHEAT—RECENT ENGLISH DECISIONS.

for to the plaintiff as the personal representative of Duncan's estate.

It is only in this view we think that the decision is maintainable in the face of the *Attorney-General v. Mercer*. It is true that the plaintiff claimed to fill a double capacity. He claimed to be both the real representative of Duncan and also his legal personal representative. His right to an account as real representative rested solely on his being the grantee of the realty. It is clear, therefore, that the validity of the grant was of vital moment to the success of his claim to an account, if it had altogether rested on that ground. But as personal representative, his right to an account did not depend on his being grantee of the personalty, but on his letters of administration constituting him legal personal representative.

By the terms of the plaintiff's oath to lead the grant of administration, he was bound faithfully to administer the estate by paying the debts, and distributing the residue "according to law;" and he would, therefore, be bound to account to those who might be found really entitled, in the event of the grant to himself being invalid. And although the grant of administration to him appears to have been made on the ground that he filled the character of grantee of the Crown of the escheated estate, yet after all, the validity of the grant for the reason we have mentioned, was not as the learned judge determined, in question.

Although it seems clear, that so far as the mortgagee was concerned, the equity of redemption on the death of Duncan did not escheat to the Crown, but merged in the legal estate—(*Burgess v. Wheate*, 1 Eden. 210; *Beale v. Symonds*, 16 Beav. 406; *Attorney-General v. Sands*, Tud. L. C. 604, 3rd ed.; *Chisholm v. Sheldon*, 2 Gr. 210; *Downe v. Morris*, 3 Ha. 394; and see *Dennis v. Badd*, 1 Chy. Ca. 156): yet when the estate came into the hands of the executor, it seems equally clear that he could not set up the indefeasible title of the

mortgagee as against those beneficially interested in the estate of his testator: see *Foster v. McKinnon*, 5 Gr. 510; *Lamont v. Lamont*, 7 Gr. 258.

RECENT ENGLISH DECISIONS.

The February numbers of the *Law Reports* consist of 10 Q. B. D. 57-160; and 22 Ch. D. 129-282.

STATUTORY REMEDIES.

In the former of these the first case, *Munday v. Thames Iron Works Co.*, is a decision under the Employers' Liability Act, 1880, but attention may be called to the passage in the judgment of Manisty, J., where he says:—"The ordinary principle is that if there is a statutory proceeding for a particular cause of action, and compensation is recovered, although limited in amount, an action at common law for large damages shall not be maintained."

AFFIDAVITS—HEADING.

The case of *Blaiberg v. Parke*, p. 90, was one on the Bills of Sale Act, 1878, which requires that an affidavit shall be filed with a bill of sale, showing the residence and occupation of every person attesting such bill of sale. In the present case, the affidavit was made by the attesting witness, and in the heading of the affidavit the deponent's residence was not specified in the body of the affidavit. The Divisional Court held the affidavit was, nevertheless, sufficient, Denman, J., going so far as to say, referring to a dictum of Lord Cairns in *Re Lowenthal*, 2 Jur. N. S. 451:—"I am inclined to think that after the strong dictum of Lord Cairns, the right conclusion is that the description in the heading forms part of the affidavit itself.

. . . It seems to me that when the deponent swears that the contents of his affidavit are true, the heading of the affidavit describing him as it does here, he may be indictable for perjury, provided he does so

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corruptly and with intent to deceive, in the event of such description being untrue."

GAMING—BETTING—PRINCIPAL AND AGENT.

In the next case, *Read v. Anderson*, p. 100, the point decided may be concisely expressed in the words of the Judge (Hawkins, J.), himself:—"If a person employs another to bet for him in the agent's own name, an authority to pay the bets, if lost, is coupled with the employment; and although before the bet is made, the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bet, the authority to pay it if lost becomes irrevocable." Hawkins, J., first points out that wagering contracts are not illegal either by common law or statute, they are simply rendered by the latter null and void, and not enforceable by any process of law. He then arrives at the above result by the following process of reasoning:—"Although the law will not compel the loser of a bet to pay it, he may lawfully do so if he please; and what he may lawfully do himself, he may lawfully authorize anybody else to do for him; and it by his request or authority, another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use. . . . As a general rule, a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule, one of which is that when the authority conferred by the principal is coupled with an interest based on good consideration, it is in contemplation of law irrevocable, that is, though it may be revoked in fact, that is to say, by express words, such revocation is of no avail

. . . In the present case, the authority to pay bets, if lost, was coupled with an interest, it was the plaintiff's (the betting agent) security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost, the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making

of the bets, the authority to bet might beyond all doubt have been revoked; but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words, the case may be stated thus: if a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority, if the obligation is incurred to discharge it at the principal's expense, the moment the agent on the faith of that authority does the act, and so incurs the liability, the authority ceases to be revocable. . . .

The opinion I have expressed as to the irrevocability of the authority to pay lost bets, applies only to cases where the agent by the principal's authority, makes the bets in his own name so as to be personally responsible for them."

PRIVILEGE—CRIMINATING QUESTIONS

The next case, *Lamb v. Munster*, p. 110, is an interesting one. The defendant in an action for libel, was asked whether he had, in fact, published the libel. He refused to answer on the ground that the answer "*might tend to criminate*" him. The Divisional Court held this was sufficient, where, as in this case, from the nature and the circumstances such a tendency seemed likely or probable. Field, J., says:—"The principle of our law, right or wrong, is that a man shall not be compelled to say anything which criminales himself. Such is the language in which the maxim is expressed. The words "criminate himself" may have several meanings, but my interpretation of them is "may tend to bring him into the peril and possibility of being convicted as a criminal." And Stephen, J., lays the law down thus:—"In every case the principle itself has to be considered, and it would not be well to lay down any kind of strict rule as to the particular form of words in which persons are to be compelled to express their opinion as to

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whether or not the answer to questions would criminate them. When the subject is fully examined, it will, I think, be found that the privilege extends to protect a man from answering any question which "would in the opinion of the Judge have a tendency to expose the witness, or the wife or the husband of the witness, to any criminal charge." Step. Dig. Law of Ev. 3rd Ed, Art. 120.

. . . I do not think the cases cited go any further than this, viz.: that the Court which has to decide must be satisfied on the oath of the witness that he does object on that ground, and that his objection is *bona fide*. . . A man is not to be forced to answer any question if the witness swears that the answer "may" or "will" or "would" endanger him (I care not for the form of words in which he expresses it), and in the opinion of the Judge the answer may, not improbably, be of such a nature as to endanger him."

MUNICIPAL LAW—HIGHWAY—NUISANCE.

Of the next case, *Kent v. Worthing Local Board*, p. 118, it seems only necessary to say that it is authority for the principle that municipal authorities are under a legal obligation to make such arrangements that works of whatever nature, under their care, shall not become a nuisance to the highway."

MUNICIPAL LAW—NUISANCE OR INJURIES TO HEALTH—R. S. O. C. 190, SECT. 4.

The next case requiring a word of notice is *The Bishop Auckland Local Board v. Bishop Auckland Co.*, p. 138, in which the Divisional Court held that where the Imp. Public Health Act, 1875, (cf. R. S. O. c. 190, sect. 4) enacts that "any accumulation or deposit which is a nuisance or injurious to health," shall be deemed to be a nuisance liable to be dealt with summarily under the Act, this must not be taken to mean "nuisance injurious to health," but "a nuisance either interfering with personal comfort, or injurious to health." Hence, they held that an offence within the section was committed when the accumulation emitted offensive smells, which

interfered with the personal comfort of the neighbours, but did not cause injury to health.

CARRIERS—TEMPORARY LOSS—37 VICT. C. 25, SECT. 2, DOM.

The next case, *Miller v Brash*, p. 142, was an appeal from the decision of Lopes, J., reported L. R. 8 Q. B. D. 35, and noted in this Journal. It will be remembered the plaintiff delivered to the defendants, who were carriers for hire, a trunk to be shipped by them to Italy. By mistake, the defendants shipped it to New York, and it was not till after the lapse of a long time that the plaintiff recovered it. Some of its contents were goods which should have been declared under the Imp. Carriers Act, being above £10 in value. Substantially, the question raised by the present appeal was as to the liability of the defendants to pay damages for the loss or detention of these goods, which were not declared. The case has application here by reason of 37 Vict. c. 2, sect. 2, Dom., which enacts that "carriers by water shall be liable for the loss of or damage to the personal baggage of passengers by their vessel. . . provided that such liability shall not extend to any greater amount than \$500. . . Unless the true nature and value of such articles so lost or damaged have been declared and entered." Lopes, J., had held in the Court below, that the carriers were liable to damages for the detention of the goods above £10 in value and undeclared, although, under the Carriers' Act, they were not liable for the loss of them. The Court of Appeal, however, over-ruled this, and held that "if goods which ought to be declared, and are not declared, are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences." They point out that not only is this view of the Act supported by authority, but that apart from authority, it would simply render the Carriers' Act nugatory to hold carriers liable for detention, which is itself the result of the loss for which they are not liable; and so in the case of a temporary loss by carriers, to hold them not

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liable for the loss, but liable for the consequences of it, is practically inconsistent, and so to construe the Carriers' Act would, in effect, be to render it inoperative.

CONTRACT—PROMISE TO WILL—PART PERFORMANCE.

As to the next case, and the last in the February number of 10 Q. B. D., *Humphreys v. Green*, the following remarks occur in the London *Law Times* for Feb. 24th ult. :—“The recent case of *Alderson v. Maddison*, L. R. 7 Q. B. D. 174, 48 L. T. Rep. N. S. 334, afforded a startling instance of the principle which guides the Courts in considering whether there has been a sufficient part performance of a parol contract relating to land to take it out of the operation of the Statute of Frauds. The general principle was thus stated by Baggallay, L. J., in delivering the judgment of the Court :—‘If in any particular case the acts of part performance of a parol agreement as to an interest in land, are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocally referable to the agreement ; in other words, there must be a necessary connection between the acts of part performance and the interest in the land which is the subject matter of the agreement ; it is not sufficient that the acts are consistent with the existence of such an agreement, unless that agreement has reference to the subject matter.’ This statement of the law has lately been approved in the still more recent case of *Humphreys v. Green*, L. R. 10 Q. B. D. 148. Exception was, however, taken by Brett, L. J., in his judgment in the latter case, to one of the examples adopted by Baggallay, L. J., as illustrating the general principle above quoted. It was as follows :—‘Thus payment of part, or even of the whole of the purchase money, is not sufficient to exclude the operation of the statute, unless it is shown that the payment was made in respect of the particular land, and the particular interest in the land which is the subject of the parol agreement.’ To this illustration, Brett, L. J., takes exception, p. 160, for he says that in his opinion,

payment of part or even of the whole of the purchase money, under any circumstances, is not sufficient to exclude the operation of the statute. It would, certainly, seem that *Nunn v. Fabian*, L. R. 1 Ch. 35, is an express authority for the words adopted by Baggallay, L. J. On this particular point, however, as to whether payment of the purchase money can amount to a part performance sufficient to take a parol contract out of the Statute of Frauds, it will require a decision of the House of Lords to put the matter beyond the range of controversy.”

The remaining February number of the *Law Reports* is 22 Ch. D. p. 129 to p. 282.

CONSTRUCTION OF STATUTES—COSTS

The first case requiring notice is *Ex p. Webster*, p. 136. There are three points which may be called attention to here. The first relates to the construction of statutes. The question was whether a certain requirement in the Bill of Sale Act, 1878, had been complied with. Jessel, M. R. says :—“The present appeal is really a temptation to make bad law. It is a very hard case indeed. If I could so construe the Act as to decide in favour of the appellant, I should be very much inclined to do so. But that is not the province of a Judge. His duty is to find out the meaning of an Act of Parliament, without regard to the question whether it may not in the particular case produce a result which he may think contrary to the intention of the Legislature.” The other two points relate to costs, and are (i) that costs will not be allowed of shorthand notes of evidence which are not used on the hearing of an appeal, the decision turning on a question of law ; (ii.) where notice of appeal is served on a party whom the appeal does not affect, and on whom it should not have been served, and the said party appears on the hearing of the appeal, though he ought not to have done so, he will not be entitled to any costs of the appeal.

RECENT ENGLISH DECISIONS—MR. BENJAMIN, Q.C.

CONSTRUCTION OF STATUTES.

Of the main portion of the next case, *Spence v. Metropolitan Board of Works*, p. 142, it is unnecessary to take notice, as it relates to the construction of certain words in an Imperial Act relating to the taking of land by the Metropolitan Board of Works, to which we do not seem to possess an equivalent in our Acts relating to similar subjects. But there are two observations on the subject of the construction of the statutes which may be mentioned. At p. 149, Chitty, J., observes: "I take it as a general rule in construing statutes, that the same words must be *prima facie* construed in the same sense in the different parts of the statute." And at p. 157, Cotten, L. J., says:—"I do not see how we can construe a word in one statute by reference to its use in another, in which the context may be different;" and Jessel, M. R., says:—"I think you cannot refer to the other Act."

PARCELS—ADJOINING TENEMENTS

In the next case, *Francis v. Haywar.*, p. 177, the question was whether the fascia over a certain gateway was a part of the premises demised to the plaintiff, or whether it belonged to the defendant. As Jessel, M. R. said, the question was one of fact, not of law—parcel or no parcel. But it may be worth while to notice his remark that "It is quite possible that something imbedded in one house may be a parcel of another house, though quite separate from it."

LEAVE TO APPEAL—LAPSE OF TIME

In the next case, *Pearreth v. Marriott*, p. 182, a certain order was made in 1861, in an administration suit, which had been acted upon ever since, and the Court of Appeal held, that considering the lapse of time, leave ought not to be given to appeal from the order.

A. H. F. L.

SELECTIONS.

MR. BENJAMIN, Q.C.

WITH the conclusion of the Civil War, Mr. Benjamin had to effect his escape from Richmond, and, more fortunate than his chief, Mr. Jefferson Davis, he succeeded in making his way to the coast of Florida. After experiencing strange adventures in a small craft laden with sponges, on board of which he put to sea, Mr. Benjamin landed safely in this country, to find that his fame as a lawyer and a statesman had preceded him, and that the Confederacy which he served so warmly had still some friends. Mainly by the advice and assistance of the late Chief Justice Pollock, Mr. Benjamin contrived to get called to the English Bar without losing three years in keeping terms. He was fifty years old when he first put on the wig and gown of an English barrister, and the tremendous experiences through which he had already passed would have exhausted the energy of most public men. With the exception of a comparatively small sum lodged by him in the hands of Messrs. Overend and Gurney, Mr. Benjamin had nothing wherewith to make a new start in life, and he had come, moreover, at a mature age to an old country, where to rise Antæus-like from the ground is a thousand times more difficult than upon that young and exuberant continent which he had left behind him.

The history of the English Bar will hereafter have no prouder story to tell than that of the marvellous advance of Mr. Benjamin from the humble position he occupied as a junior in 1866 to the front rank of his profession in 1883. Adversity, however, had not yet done with him when she sent him, broken indeed in fortune, but endowed with inextinguishable vitality and hope, to this country at the end of 1865. In the following year there came that memorable "Black Friday," which is not yet forgotten in city circles, and was caused by the sudden suspension of Messrs. Overend and Gurney. By the fall of that great house Mr. Benjamin lost the sum of three thousand pounds—all that he possessed on earth—and had to cast about for something to do until his book on the "Sales of Personal Property" was completed. Having a wife and daughter to maintain in Paris, and himself in London, he prepared with that easy adaptability to circumstances

MR. BENJAMIN, Q.C.—COWAN V. MCQUADE.

[Div. Ct.]

which has distinguished him throughout the whole of his versatile and many-sided career, to sustain himself for awhile by writing for the press. It was under these circumstances that he temporarily joined the staff of *The Daily Telegraph*, and continued for many months a series of brilliant leading articles to the columns of this journal. The publication of his book on "Personal Property" brought him immediately into notice; nor could any better evidence of his quick and incisive diagnosis be adduced than the fact that in the great and tangled wilderness of British jurisprudence he should so readily have discerned one track which was yet unmapped. Shortly after its publication Baron Martin, when taking his seat one morning upon the bench, asked to have Mr. Benjamin's work handed to him. "Never heard of it, my Lord," was the answer of the Chief Clerk. "Never heard of it!" ejaculated Sir Samuel Martin; "mind that I never take my seat here again without that book by my side." It was soon after this date that, speaking to one of Mr. Benjamin's most intimate friends, the same able judge pronounced the new ornament of the English Bar to be "the greatest advocate since Scarlett." It is doubtful, however, whether Mr. Benjamin would ever have been so effective before a British jury or in the atmosphere where Scarlett was omnipotent as he was in the Appeal Courts of the House of Lords and the Privy Council. To these Courts he confined himself exclusively towards the end of his English career, and it may be doubted whether any Lord Chancellor, assisted by noble and learned assessors, ever heard an advocate plead before them in whom a comprehensive knowledge of jurisprudence, a singular force and lucidity of reasoning, and the most felicitous neatness and fluency of illustration and exposition were more happily combined. It was of Mr. Benjamin that a brother barrister said, "He makes you see the very bale of cotton he is describing as it lies upon the wharf at New Orleans. Many lawyers will doubtless be ready at this moment to recall Mr. Benjamin's great triumphant argument on behalf of the captain of the Franconia. Others, again, who have heard him plead in New Orleans and Washington, will remember that he was as well acquainted with the French and Spanish as he was with the English language. Sufficient will it be for us at this moment to hope, in the name of the Bar which has watched his brilliant and brave career, that

many years of well-earned repose may be Mr. Benjamin's portion in the beautiful residence which he has built himself in Paris, and in the centre of that devoted family to which he is so deeply attached.—*Daily Telegraph*.

REPORTS

ONTARIO.

FOURTH DIVISION COURT, VICTORIA

(Reported for the LAW JOURNAL.)

COWAN V. MCQUADE.

Application to sign judgment where no defence, under O. J. A. rule 80, refused.

DEAN, Co. J.—The plaintiff sued the defendant in this action upon a promissory note for \$35. The defendant entered a note disputing the claim, and the plaintiff now applies upon an affidavit, such as is required under Order 10, rule 80, of the Judicature Act, for a summons, calling on the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment.

The plaintiff asks this under sect. 244 of the Division Court Act, which reads as follows:—"In any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law to actions and proceeding in the Dominion Courts."

This is the first application that has been made to me in a Division Court under this order, and I know of no direct authority upon the point, though *Willing v. Elliott*, 37 U. C. R. 320, was decided upon an attempt to import into the Division Court practice a very similar principle, and there it was held that the procedure was not applicable to Division Courts; in that case a prohibition was granted restraining an order made by a County Judge for a defendant to be examined under the Administration of Justice Act. The object sought by examinations of defendants under that Act, in cases like those contemplated by Order 10, was usually the same as under this order. If the examinations disclosed that the defendant had no defence, that his pleas

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were, in fact, false, they were struck out by the Court, and the plaintiff had leave to sign final judgment. Order 10 arrives at the same result by legislative enactment, and provides for substantially the same practice. Rule 80 provides that the judge may, if he think fit, order the defendant to attend and be examined upon oath; or to produce any books or documents, or copies or extracts therefrom. The learned judge in that case, amongst other reasons, laid stress upon the fact that such practice would give the Division Court "power to examine persons situate in other parts of the Province it may be, than in the County (within) which such Division Court is established."

I am by no means sure that this case cannot be fairly regarded as an authority against the plaintiff's contention, but I need not decide this, for I do not feel that it would be a wise or just exercise of the discretion allowed by sect. 244 to introduce this practice. Nothing can be clearer than this, that where a judge advances beyond legislation, or in any way carries the law or practice beyond its former boundaries, he must see to it that his extension cannot work injustice. Whatever there may be of inequity in the law as he finds it, is no concern of his, but it is his duty not to lay down any rule or make any precedent which he sees may, in cases which would be governed by such rule or precedent, work a wrong. If I grant this summons, and so introduce this practice into the Division Courts of this County, I must grant a summons in every case where application is made upon like material, and it will be contrary to all experience if, before long, some defendant does not "disclose such facts as may be deemed sufficient to entitle him to defend the action," and at the trial establish his defence and get judgment in his favour. Meanwhile he has been put to expense which may amount to a large percentage on the claim which he has successfully resisted in answering the interlocutory summons. It must always be returnable at the county town; so that a defendant living in a remote division, whom the Legislature has carefully protected from the trouble and expense of having to make his defence away from home, is compelled to incur an outlay and submit to an inconvenience entirely inconsistent with the spirit of the Division Court Act. But it is not the worst that would follow.

A defendant in the County Court or in the High Court, having succeeded under such circumstances, would have taxed to him his costs of answering this summons; but in the Division Court there is no provision for his getting these costs, and so a serious injustice would be done him. On the other hand, the plaintiff, if successful, would get his costs of serving this summons (see Division Court Rule 2 and Schedule of Bailiff's fees). The practical working of this principle of practice would soon shew that this is no mere imaginary difficulty. If this plaintiff, with his claim for \$35, can have his summons for this defendant, who lives only ten miles from town, another plaintiff with a claim for \$10 cannot be refused a summons for a defendant who lives forty miles off, or for that matter, in a distant county hundreds of miles away. What is the defendant in such case to do, if he believes himself to have a good defence? Shall he spend the amount of the claim in costs, which he can not be recouped, or shall he meekly submit to the wrong?

The introduction of this principle into a court for the trial of small causes, even if this injustice could be got over, would make a procedure which was intended to be simple and inexpensive, complicated and burdensome. It must be borne in mind that Order 10 is not confined to actions where the plaintiff's claim is ascertained by the signature of the defendant, but extends to all actions where the plaintiff seeks to recover a debt or liquidated demand in money arising from a contract expressed or implied. This covers nine out of ten of the cases which come before Division Courts. But if it came to be generally understood that any plaintiff with his petty claim who had confidence in the goodness of his cause and in the weakness of the defence, could make an application, and, if successful, get his costs from the defendant, and if he failed not be liable to the defendant for costs, a state of things would grow up which would make the Division Courts little short of a public nuisance. How far this principle might wisely be applied to the extended jurisdiction, with proper provisions as to costs, is only for the Legislature to say; but until it chooses to make some change in the law, I shall regard it as the exercise of a sound discretion to leave the matters as it has left them.

Summons refused.

RECENT ENGLISH PRACTICE CASES.

MILLER v. PILLING.

Imp. J. A. 1873, ss. 57, 58—Ont. J. A. ss. 48, 49
—Official referee—Form of report.

A referee under the above sections is not bound to give his reasons for his findings; he may simply find the affirmative or the negative of the issues, and the issues in an action cannot be sent back to him for retrial or further consideration merely on the ground that his report does not set out the reasons for his findings.

[C. A. June 9, 1882—L. R. 9 Q. B. D. 736.]

Per BRETT, L. J.—“If it could be shown that the findings of the official referee were against the weight of evidence, they might be set aside.”

Per COTTON, L. J.—“In my opinion the official referee is not bound to set out the steps by which he has arrived at his conclusion; it is unnecessary for him to do so; he has only to find the ultimate issues of fact.”

[NOTE.—*The Imperial and Ontario sections are virtually identical.*]

WILLIAMS v. MERCIER.

Imp. O. 1, r. 2, O. 40, r. 10—Ont. rules 2, 321—
Interpleader—Motion for new trial—Power of
Court of Appeal.

On the trial of an interpleader issue the jury found that certain properties belonged to B. and that the execution debtor, C., was not entitled to seize them. On an application for a new trial the Court of Appeal held the property belonged to A., the execution debtor, and that C. was entitled to seize them.

Held, the Court of Appeal had power under *Imp. O. 40, r. 10*, (*Ont. r. 321*), to order judgment in the interpleader issue to be entered for the execution creditor without directing a new trial.

[C. A., May 25, 1882—L. R. 9 Q. B. D. 337.]

Per JESSEL, M. R.—“With respect to the order that we ought now to make, it is quite clear that *Order 40, r. 10*, (*Ont. r. 321*), applies to every application for a new trial; there is no exception of interpleader proceedings. It is true that *O. 1, r. 2*, (*Ont. r. 2*), the old practice of interpleader is continued, but there are no negative words in *O. 40, r. 10*, (*Ont. r. 321*), to exclude the new powers of the Court of Appeal in carrying out that practice.”

[NOTE.—*Imp. O. 1, r. 2, is substantially identical with Ont. r. 2. Imp. O. 40, r. 10, is identical with Ont. r. 321.*]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW
SOCIETY.

COURT OF APPEAL.

[March 6.]

RE PHIPPS.

Extradition—Forgery.

The judgment of the Queen's Bench Division, reported 1 *Ont. Rep.* 585, affirmed.

BELL v. LEE.

Will—Insane delusions—Fraud on power
appointment.

The decree in this cause, 28 *Gr.* 150, reversed so far as the will was declared void, on the ground of insane delusion.

The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or his brother or sister. By his will the testator gave portions, about one quarter of his estate to two of his children, and as to the residue he appointed the same to his brother, Charles Thomas Bell, desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to Elizabeth Bywater the policy of assurance upon his life for \$3,000, and all moneys arising there from.

Held, that as to the portions of his estate given to his two children the will was valid; but as to the appointment to his brother C. T. B., the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to such residue the will was inoperative and void, and that as to so much there was an intestacy.

Bethune, Q.C., and *Moss, Q.C.*, for appellant.

MacLennan, Q.C., for E. Bywater.

McCarthy, Q.C., and *A. Hoskin, Q.C.*, for respondents.

MCDONALD v. MCARTHUR.

Promissory note—Presentment—No funds.

On an appeal from the judge of a Division Court where the learned judge had given judg-

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NOTES OF CANADIAN CASES.

[Chan. Div.]

ment against the defendant, the defendant for the first time raised an objection that proof should have been given that there were no funds at the bank where the note was made payable.

The Court, (SPRAGGE, C. J. O.,) passing over the objection of the question being first raised at that stage of the case, *held* that no such proof of want of funds was requisite to entitle the holder of the bill to recover.

McMichael, Q.C., for appeal.

Falconbridge, contra.

DUMBLE v. DUMBLE.

Will, construction of.

The decree made herein (reported 20 Gr. 274) varied by striking out the words "absolutely for her own use," and substituting therefore "for and during her natural life," and adding "and upon the death of the said defendant the brothers and sisters of the said testator are, under the provisions of the will and letter, entitled to the said personal property absolutely to their use in equal portions."

ALLAN v. MCTAVISH.

Practice—Liberty to appeal after five years.

In January, 1879, judgment was given by this Court against the defendant, who did not appeal, but in February, 1883, applied to this Court for liberty to appeal to the Supreme Court on the ground that by a recent decision of the Court of Appeal in England, involving the same point, it had been determined that the defence of the defendant was good.

The Court, following the ruling in *Craig v. Phillips*, 7 Ch. D. 249, refused the appeal with costs.

QUEEN'S BENCH DIVISION.

Osler, J.]

[Jan. 29.]

ROBERTSON ET AL. v. KELLY.

Contract by lunatic, validity of.

The plaintiffs made certain necessary repairs upon the defendant's vessel. At the time the agreement for the repairs was made, one of the plaintiffs knew that the defendant was subject to insane delusions, believing that people were conspiring against him. He, however, superintend-

ed the repairs and talked intelligently to the workmen, but some months after he became violent and was confined in an asylum for the insane.

Held, that the plaintiffs were entitled to recover for the work done.

Tilt, for plaintiff.

McCarthy, Q.C., contra.

CHANCERY DIVISION.

Divisional Court.]

[Feb. 6.]

EVANS v. WATT.

Seduction—Marriage to third party during pregnancy—Cause of action—Evidence of daughter and husband, admissibility of.

Where an unmarried woman is seduced and pregnancy follows, or sickness which weakens or renders her incapable to work or serve, the father's cause of action is complete and cannot be divested by the subsequent marriage of his daughter before birth of a child. The facts of seduction, pregnancy, and illness might be proved by the daughter, but she might refuse to answer as to who was the cause of her pregnancy if she asserted that the child she bore was born in wedlock.

But where the daughter was married to a third person during her pregnancy consequent upon her seduction by the defendant, and her child was born in wedlock, and the action was brought at the instigation of the husband, he and his wife being the only witnesses, and no proof of sickness or inability to serve was given,

Held, [ARMOUR, J., dissenting,] that a non-suit was properly entered.

Per ARMOUR, J.—If loss of service were necessary to be proved a new trial should be granted for that purpose, and it cannot be said that under such circumstances a father sustains no damages apart from the loss of service.

Dunbar, for plaintiff.

Falconbridge, contra.

Divisional Court.]

[Feb. 15.]

KLEIN v. THE UNION FIRE INSURANCE CO. ET AL.

Insurance—Mortgage—Subrogation—Statutory conditions—Company—Misrepresentation.

This was an appeal from the judgment of

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Ferguson, J., noted in this Journal *ante* Vol. 18, p. 345.

The facts of the case are concisely stated there, it being only necessary to add, for the understanding of the present judgment, that at the time of the insurance in the Union Fire Insurance Co., \$1,000 had been paid on the plaintiffs' mortgage, leaving the balance \$3,000.

Held, now (reversing FERGUSON, J.), that it should be declared that the mortgage has been paid, and that the proper discharge should be executed, and that the loan company should pay the balance of the insurance money to the plaintiffs, with interest from the time when it would be payable under the policy, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating as advised their respective liabilities as between themselves.

For (I.) it was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of the non-communication to the Insurance Co. at the time the policy issued, of Klein's previous retirement from the firm, because (1) as a matter of law (*a*) Klein, though he had so retired, retained an insurable interest both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; (*b*) even if Klein had no interest at all, the surviving partners could recover according to the extent of their interest, in the present action; and (2) as a matter of fact, the failure to disclose Klein's change of position, is not shown to have been to the prejudice of the company, or material to the risk.

Semble, even if notice of the change had been of moment, yet, since the evidence showed that the matter of the policy, as between the Loan Company and the Insurance Company, was left to the under-clerks to deal with, and that a clerk of the Loan Company informed a clerk of the Insurance Company of the change in question, a jury would on this evidence have little difficulty in finding that notice of the change was communicated to the Insurance Company.

(II.) It was not correct to say that statutory condition No. 1 was broken, and the policy avoided, by reason of non-communication of other mortgages, subsequent to that to the Loan Company, existing on the property, because (1) as a matter of law, (*a*) as held in *Samo v. Gore District Mutual Insurance Co.*, 1 App. 545, the

existence of an incumbrance cannot be pronounced a material fact, the non-communication of which will, apart from stipulation, irrespective of its nature and amount, and without any imputation of fraudulent concealment, enable the underwriter to repudiate the liability; (*b*) as the Insurance Company dispensed with the usual application, and with any interrogatories as to the exact nature and extent of the interest to be insured, the assured were not bound to state it. There was, at least, contributory negligence on the part of the insurers, who may also be regarded as having waived information as to the incumbrances; (2) as a matter of fact, it did not appear from the evidence that the non-disclosure as to the mortgages was a non-disclosure of a fact material to the risk, or that the rate of premium would have been affected by a knowledge of them on the part of the Company, but rather the contrary.

(III.) It was not correct to say that statutory condition No. 8 was broken, and the policy avoided, by reason of there being prior insurances unassented to by the Union Fire Insurance Co., because the evidence clearly showed that the policy of the Union Fire Insurance Co. was to take the place of the policy on the Royal Insurance Co., in pursuance of the usual mode of dealing between the Union Loan Co. and the Union Fire Insurance Co., and of the two prior insurances, one was marked on the face of the Royal policy as assented to, and the other had been taken in substitution for another which appeared in like manner as assented to in the Royal Policy; and *Parsons v. The Standard Insurance Co.* 5 S. C. R. 234, showed this substitution was immaterial so far as the Royal policy was concerned; and these two policies were current when the policy in the Union Fire Insurance Co. was taken out. It was the duty of the Union Fire Insurance Co. to have properly issued their policy, agreeing to take the position of the Royal, as also it was the duty of the Union Loan to see the policy properly issued. But as a reformation of the policy was not asked on the pleadings, the Union Fire might succeed on the technical defence as to the prior insurances not being assented to on their policy, so far as the \$1,000, which had been paid on the mortgage was concerned.

(IV.) The representations made to the plaintiffs by the Union Loan Co., and especially their letter of March 14, 1881, stating that the policy was

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[Chan. Div.]

indisputable on any grounds, were such as the said Company was bound to make good, especially since the only difficulty in the plaintiffs' way to recover was occasioned by the neglect of the Loan Company (acting as the plaintiffs' agent), in not having the other insurances properly assented to in the policy.

(V.) As to the claim of the Insurance Co. to foreclose the mortgage, as assignees of the Loan Co., this claim could not be entertained, because since the plaintiffs could recover on this policy but for the failure to have endorsed on it the two prior insurances, and since such omission would be remedied on a properly framed record, it followed that the Union Fire Insurance Co. could not take advantage of their own default and neglect in making the formal entry of assent in their policy, to bring into play the subrogation clause for their own advantage. (2) Apart from this, the case was not governed by *Springfield Fire Insurance Co. v. Allen*, 43 N. Y. 389, which is distinguishable in that (a) there the policy became avoided by subsequent act of the mortgagor insured; (b) the policy there was made and accepted by the mortgagee personally intervening with full knowledge of all the terms and conditions of the policy, including the subrogation clause. Neither of the elements existed in the present case. Here the Union Fire Insurance knew that the premiums were being paid by or charged against the mortgagors, and, therefore, that the equity of the plaintiffs was to have the policy moneys applied in reduction of the mortgage, and as between mortgagors and mortgagees this could not be changed by an arrangement made between the latter and a third party, without the knowledge or assent of the mortgagors. Hence, in the present case, the claim of the plaintiffs to have the insurance money applied in satisfaction of the mortgage, was to be preferred to that of the insurers to have the mortgage assigned to them as a security. The mortgage, as a chose in action, passed to the insurers, subject to all equities.

Seemle, there was sufficient evidence, if it had been necessary, to establish an affirmation of the contract by the Union Fire Insurance Co., and an election to treat the policy as valid.

S. H. Blake, Q.C., for appellants.

Rose, Q.C., and *Macdonald*, for the Union Loan and Savings Co.

Bethune, Q.C., and *A. Gall*, for the Union Fire Insurance Co.

Ferguson, J.]

[March 7.]

HUGHES v. REES.

Private international law - "Community property"—Concurrent suit in Quebec—Locus of bank stock.

In the Province of Quebec when there is no ante-nuptial settlement the law makes a settlement of the property of the parties upon their marriage, and also of property subsequently acquired. This is called "Community Property," and it is not in the power of the husband, during the coverture, to make a gift of the community property, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children if the gifts are properly accepted. This legal settlement takes effect whether the marriage ceremony takes place in Quebec or elsewhere, and whether the property of the wife happen to be in that Province or elsewhere, provided the domicile of the husband is in that Province, and the parties intend immediately to go and reside in Quebec. Until two or three years ago the laws of the Province of Quebec did not recognize a trust created by deed *inter vivos*.

In this case the parties were married in Toronto in 1859. The husband was domiciled and carrying on business in Montreal. They intended, immediately after marriage, to go and reside in Montreal, which they did. On March 3, 1875, a deed was executed at Toronto between the wife of the first part and one A., and the husband of the second part, whereby the three parties covenanted that certain Ontario bank stock, in which certain monies which the wife had received after the marriage had been laid out, and which were then held in the name of the husband in trust for the wife, should be duly transferred into the names of A. and the husband, and that this stock, as well as a sum of \$4,000, which the wife had received from her mother at the time of the marriage, and which had been put into the commercial business of the husband in Montreal, should be held by A. and the husband in trust to invest as therein mentioned, and to permit the wife, during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue, over. The husband had always, up to the time of this suit, resided in Montreal; A. resided, and had long resided, in Toronto. On February 8, 1877,

the bank stock was transferred in trust pursuant to above deed. The head office of the Ontario Bank is in Toronto.

Held, inasmuch as all the property settled appeared on the evidence to have become and to have been community property, and, although the bank stock must be held to have been at the time of the execution of the deed, and of the transfer to the trustees, situate in Ontario, notwithstanding that the Bank had for convenience sake made provisions for making transfers in Montreal; yet, since the trust deed did not purport to be a complete and consummated transfer of the property in the stock, but contained only a covenant to transfer, and was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock.

Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of Quebec, and under that law the transfer both as to the wife and the children was void. For, even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift.

Held, on the whole case, no property passed into the hands of the trustees by the transactions set forth.

The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this province.

S. H. Blake, Q.C., and G. Morphy, for the plaintiff.

J. MacLennan, Q.C., and R. E. Kingsford, for the husband.

Donovan, for the wife.

C. Moss, Q.C., for the infant defendants.

PRACTICE CASES.

Mr. Dalton, Q.C.]

[Dec. 8, 1882.]

RE WITHROW, POUCHER V. DONOVAN.

Garnishment—Mortgage.

One Withrow was an execution creditor of the plaintiff Poucher for deficiency after sale of lands in a mortgage suit. Poucher obtained a judgment against the defendant Donovan under Mechanics' Lien Act, whereby it was referred to the Master in Ordinary to ascertain the amount of plaintiff's claim, if any, the judgment being the usual one under the Act.

Pending the reference Withrow applied for an attaching order against whatever amount might be found due Poucher.

On the application Poucher alleged fraud in the mortgage sale proceedings, and sought, by way of cross motion under the O. J. A., to attack Withrow's judgment. It was also urged that nothing was yet ascertained to be due Poucher, and consequently there could be no attachment.

THE MASTER IN CHAMBERS—It is most beneficial that suits be decided step by step, and that things should not be thrown into one general mass from the beginning, and an attempt be made to do justice upon the whole case in a summary manner.

In this garnishing proceeding the debtor sets up matter, not by direct statement either, but rather from suspicion and hints of what he would wish implied, attacking the plaintiff's judgment upon grounds prior to the judgment itself. I suppose he has a remedy if what he insinuates be true, but it is much better that he should directly attack the plaintiff's judgment, and have a decision upon what he complains of, then that he should be allowed to look back so far for a defence to this motion; it is better to keep them separate. Should he succeed in avoiding the plaintiff's judgment the plaintiff will be ordered to pay back not only what the plaintiff may receive in the present proceeding, but what he has received hitherto. The interests of other parties are concerned in having this garnishing proceedings decided. I must make the order to pay over what, if anything, may be found due, with costs.

F. Moffatt, for the execution creditors.

Rae, for plaintiff.

Caddick, for defendant.

Cameron, J.]

[Jan. 30.]

SCHWOB V. MCGLASHAN.

Venue—Chancery sittings—Transfer—Rule 263 O. J. A.

Notice of trial had been given for Fall Chancery Sittings at Simcoe.

Defendant obtained a change of venue to London on terms *inter alia*, that the notice of trial given for Simcoe, should stand for London.

The Judge at London refused to take the case, as it belonged to the Common Pleas Division. The action was eventually decided in plaintiff's favour, but on the taxation of his costs, the taxing officer refused to allow him the costs of the abortive attempt at trial. On appeal, Cameron, J., without deciding whether the Master's order transferring the case to the Chancery Division was a proper one, held that the plaintiff was justified in acting upon it; that the costs incurred were caused by the defendant's application to change the venue, and should properly follow the event.

Leonard, for the appeal.

Aylesworth, contra.

Mr. Dalton, Q.C.—Proudfoot, J.]

[Jan. 30.]

SKINNER V. WHITE.

Lunatic plaintiff—Next friend.

The action was brought in the name of one Skinner, by his next friend, alleging that Skinner was of unsound mind, and claiming to set aside a sale of land.

The defendant applied to have proceedings stayed until plaintiff should be declared a lunatic.

An affidavit of the plaintiff, deposing that he was sane, and desired the action to be dismissed, and those of two physicians that he was sane, were filed.

The Master in Chambers ordered a stay of proceedings.

On appeal, PROUDFOOT, J., discharged this order, on the ground that the Master had no jurisdiction to direct an inquisition in lunacy, but that Skinner or defendant might apply to dismiss the action on the ground that the plaintiff was competent to manage his own business.

J. B. O'Brien, for plaintiff.

H. O'Brien, for defendant.

Boyd, C.]

[February 12.]

FERRIS V. FERRIS.

Collusive action—Right to defend—Dower.

The action was brought by Mathew Ferris and his wife against Archibald Ferris to recover nine years arrears under an annuity deed made by the defendant to secure \$120 a year to the plaintiffs during their lives. Janet Ferris, the defendant's wife, joined in the deed to bar her dower. The defendant abandoned his wife and absconded. She brought an action for alimony and now makes application to be admitted to defend this suit on the ground that it is collusively brought for the purpose of defeating her suit for alimony, and to deprive her of dower in the lands.

Held, upholding the order of the Master in Chambers, that the applicant was entitled to be let in to defend.

Fullerton, for the application.

Clement, contra.

Proudfoot, J.]

[February 19.]

GRAND TRUNK RY. CO. V. ONTARIO AND QUEBEC RY.

Appeal—Security—Stay of execution—Ex parte order.

Under R. S. O. cap. 38, sects. 26-27, proceedings can only be stayed upon security being given both for the costs in the Court of Appeal and those in the Court below. Orders to stay execution pending an appeal should not be made *ex parte*. Such orders may be appealed to a Judge in Chamber without first moving before the Master in Chambers to rescind them.

G. T. Blackstock, for the plaintiffs, (appellants).

H. Cassels, contra.

Proudfoot, J.]

[February 19, 1883.]

HAMILTON V. TWEED.

Appeal—Time—Ex parte order.

By an order of reference the questions raised by the pleading were referred to a referee, under sect. 47 O. J. A. The referee made his report, which was dated the 17th January, and filed a day or two afterwards. On the 10th of February the defendants obtained from the Master in Chambers *ex parte*, an order, extending the time for appealing, on an affidavit of the Toronto agent of the defendant's solicitor, that such solicitor had been misled by a postal card of the

referee into believing that his report would be dated 20th January instead of 17th January, and that he was instructed and believed there was a good ground of appeal from the report.

Held, that such orders should not be made *ex parte*.

G. T. Blackstock, for plaintiff.

Watson, for defendant.

Proudfoot J.]

[Feb. 19.]

RE BATT, WRIGHT V. WHITE.

Executor—Commission.

An administration matter. Securities amounting to about \$3,238.25, were either in the hands of the plaintiff at the testator's death, or were handed to her by the defendants (the executors) immediately afterwards. The plaintiff was an executrix and residuary devisee of the testator.

Held, that under this state of facts, the executors were not improperly allowed a commission in respect of that sum.

The total amount of their disbursements, including this \$3,238.27, was \$8,228.87.

Held, that \$400 allowed by the Master at London, was not excessive.

Hoyles, for plaintiff.

F. E. Hodgins, for defendants.

Mr. Dalton, Q.C.]

[Feb. 24.]

KOHFREITSCH V. MCINTYRE.

Promissory note—Defence of fraud—Practice.

In an action on a promissory note, the seventh paragraph of the statement of defence was as follows:—

"The defendant further says she was induced to sign the said note by the fraud of the plaintiff or others, with the plaintiff's consent or knowledge, at the time of his receiving the same."

Held, on a motion to strike out the defence in default of particulars, that particulars should not be furnished, but the circumstances of the fraud should be set out in the statement of defence in a similar manner to the mode of pleading under the old Chancery practice.

Order accordingly.

Holman, for plaintiff.

Aylesworth, for defendant.

Mr. Dalton, Q.C.]

[March 2.]

REG. EX REL. BRINE V. BEDDOME.

Municipal councillor—Qualification—Relator—Costs.

The assessed value of his property determines the qualification of a municipal councillor.

The relator being an auditor of the corporation, the Master in Chambers, under *Regina ex rel. McMullen v. De Lile*, 8 U. C. L. J. 291, gave no costs.

Summons absolute to unseat respondent, and for new election accordingly.

Aylesworth, for relator.

H. W. M. Murray, contra.

Osler, J.]

[March 2.]

COGHILL V. CLARK.

Promissory note—Discretion of Master in Chambers—Amendment.

Action on a promissory note. The defendant applied for leave to amend his statement of defence by alleging that the note was not properly stamped, the note having been made before the repeal of the Stamp Act.

The MASTER IN CHAMBERS *held*, that under sect. 270, R. S. O. cap. 50, the defendant, as a matter of right, was not entitled to add this defence, as he had already set up a complete defence, if proved, and as he thought the defence of want of stamps was one without merit, he, as a proper exercise of his discretion, refused leave to add it.

On appeal the judgment of the Master was upheld.

Rose, Q.C., for defendant.

Justin, (Brampton), for plaintiff.

Mr. Dalton, Q.C.]

[March 3.]

REG. EX REL. BRINE V. BOOTH.

Municipal Councillor—Qualification—Liquor license.

On the 9th December, the liquor license of Booth Bros., of which firm respondent was a member, was transferred to one of the partners, T. W. Booth. The nomination took place on 22nd December.

On the books of the Registry Office, the respondent's freehold property appeared incumbered to nearly its assessed value. It was shown

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that these mortgages had been reduced so as to leave the property worth, according to the assessed value, \$965 over and above incumbrances.

Held, that the property qualification was sufficient, but that the respondent was the holder of a license within the meaning of R. S. O. ch. 174, sec. 74.

Aylesworth, for relator.

J. E. McDougall, contra.

Proudfoot, I.]

[March 5.]

LAWLOR v. LAWLOR.

Partition—Sale—Tenant for life—Dower.

Held, following *Gaskell v. Gaskell*, 6 Sim. 643, that a tenant for life may have a partition, and where there is a right to partition, there may be a right to a rule as the Court shall determine. R. S. O. ch. 101, sec. 81.

J. K. Kerr, Q.C., for plaintiff.

J. Hoskin, Q.C., for defendants.

Boyd, C.]

[March 12.]

ROBERTSON v. NERO.

Substitutional service—Rule 34, O. J. A.

The fact of a defendant being out of the jurisdiction is no reason for dispensing with personal service unless it appears that he is hiding or evading service, or that his whereabouts cannot be ascertained.

J. T. Small, for the plaintiff.

BOOK REVIEW.

A TREATISE ON THE LAW OF DOWER, by Malcolm Graeme Cameron, Barrister-at-Law. Toronto: Carswell & Co., Law Publishers, 1882.

The preface to this book throws on this Journal the responsibility of its birth, in that the author says, in speaking of a work on this subject being required, "Expression has been given to this felt want in the *Canada Law Journal* by an article in which the author must ascribe his first impulse towards the preparation of this volume." We are not sorry that Mr. Cameron has answered the call.

Our law in Ontario has recently been advancing in the direction of the enlargement of the

rights of a married woman in respect of her property during the life of her husband without as yet making any abridgement of, but rather extending her rights in respect of her husband's property. A knowledge of the law of Dower, and more especially of the more recent doctrines in regard to it, remains as necessary to the lawyer as ever. The law on this subject in the United States varies so much in the different States that, as Mr. Cameron points out, the comprehensive work of Scribner devoted as it necessarily is in a large degree to discussion of the conflicting decisions of the Courts of the different States, is of very little assistance to the Canadian lawyer. In England the law of Dower does not seem to have received much addition during the last forty years, and the now very old treatise of Park seems still to answer all the acquirements of the profession there. This may be owing to the facilities which the English Dower Act affords of dealing with lands so as to defeat rights of dower while only inchoate, so that questions of dower do not complicate the transactions which ordinarily come before the courts. In this Province, however, where accretions are from time to time being made to the law of Dower, English text books would only be valuable for the fundamental principles upon which Dower was originally built, and the modern additions have, for a long time, remained scattered through the reports and statute books. These are of course accessible with the cumbrous helps of digests, but their collection by Mr. Cameron into the convenient form of an orderly treatise, whose aim is to state merely the law as it exists in this Province, will be a welcome addition to our law libraries.

The general principles upon which Dower depends are fully and clearly treated in the earlier chapters of the present work, in which the writer necessarily does not depart materially from the mode in which the subject has been hitherto dealt with by text writers. The next ten or twelve chapters discuss the nature and incidents of Dower by considering in succession the various estates of the husband out of which it may or may not be claimed, such as estates in fee simple, in tail, in remainder or reversion, joint tenancy estates not of inheritance, partnership lands, trust and equitable estate, and in mortgaged estates. Modes in which dower is released or defeated follow. (chaps. 31-33), with

BOOK REVIEW.

which may be mentioned the doctrine of election between dower, and a devise or bequest in a will, this is very fully discussed in chap. 34. The work closes with a sketch of the proceedings in actions for dower.

Perhaps the portion of the work which is of most interest in Ontario is that in which dower in mortgaged estates is considered. In his preface the author modestly says that he makes no pretence to originality. In this branch of his subject, however, he has had scarcely any tracks to step in. The decisions of our own Courts and the Provincial Statutes form his materials, and these he has discussed with considerable freedom and ability, (see pp. 240 and 241), and has not hesitated to submit his own views where judicial decision has yet to be given. The author will doubtless expect to find practitioners who differ from him, and it may not be out of place to call our readers' attention to some of these as yet unsettled points. For instance, on p. 270, in the case of a purchase by the husband before marriage, he receiving a deed and giving a mortgage for a portion of the purchase money, and after marriage re-conveying to the mortgagee in satisfaction of the mortgage, his wife not joining. It may be reasonably urged that in such a case the American authorities cited to shew that the widow should be endowed, should not be followed here. There are analogous authorities in Ontario under which it could be urged that the wife would only be dowable out of the equity of redemption, which the husband could convey without the concurrence of his wife, and so defeat her contingent right to dower. It does not, indeed, seem so clear as the writer puts it on pp. 248 and 249, that the statute 42 Vict. c. 22, disables a husband from conveying his equity so as to divest the dower without the wife's concurrence. The effect of *Calvert v. Black*, 8 Pr. R. 254, seems to be that the statute only applies in the case of a compulsory sale of the land. That case was not directly impugned in *Martindale v. Clarkson*, 6 App. R. 1, and has very recently been followed by the Chancellor in *Re Ward*, (March 12, 1883), though from some of the remarks made by that learned judge in giving judgment, it might be inferred that his decision might have been different if the matter were *res integra*.

The author's construction of the above statute also tinges his views as to the propriety of joining

as a party to a foreclosure action the mortgagor's wife, who has joined in the mortgage to bar dower, (p. 248). In a suit for sale in the event of there being a surplus it would certainly seem proper that the surplus should not be disposed of in her absence; but it is only upon the happening of that event that there would seem to be any more reason for her being a party than when *Davidson v. Boyes* (6 Pr. R. 27,) was decided, and it may well be doubted whether the mortgagor's estate should be burdened with the mortgagee's costs of making the wife a party from the commencement of the suit, while her interest arises only at the time when that of the mortgagee ceases. In a suit for foreclosure, as the mortgagee takes the land if the owner of the equity of redemption, the husband, does not redeem, no right of the wife under the statute would seem to arise at any stage; and if that is the case why should she be made a party. It is possible, however, that practitioners will not care to run any risk in the matter, and will adopt the course which Mr. Cameron upholds, especially as it has been decided that the wife in the case of a mortgage since the statute, is not an improper party: (*Building and Loan Association v. Carswell*, 8 Pr. R. 73).

On the whole we think it will be found that the author has fulfilled the belief expressed in the preface that his work embraces references to most of the American cases in point, to nearly all the English cases, and, without exception, to all the Canadian ones. The profession will, we feel sure, have reason to be grateful to Mr. Cameron for his labours in rescuing from the Laureate's imputation of "codelessness" the "wilderness of single instances" in this branch of the "lawless science of our law."

The typographical appearance of the book is admirable. We have observed one or two clerical slips not noticed in the list of *corrigenda*; for instance, "vendor's," on p. 234, would seem to be intended to be "vendee's"; "simply contract" for "simple contract," on p. 237; and "Bowes" for "Boyes" in the reference to *Davidson v. Boyes*, p. 248.

CORRESPONDENCE.—ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

CORRESPONDENCE.

Signing Judgment in Division Courts under O. J. A.

To the Editor of the LAW JOURNAL.

SIR,—I enclose a judgment of Judge Dean, of Lindsay, for publication, if you consider it of sufficient importance. It is opposed to Judge Clark's judgment, recently published, and is in my opinion the safer decision. We do not want the Division Courts to supersede the County Courts, as they will do unless kept within bounds. Cases of importance involving nice questions of law, are being constantly decided without pleadings and without time for consideration, and the public interests must suffer. It is about the worst school for a young lawyer, and yet if things go on as they have been the Division Courts will monopolise the business, and leave nothing for the County Courts.

Yours, etc.,

A. B. C.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Contracts in letters.—*London L. J.*, Dec. 16, 1882.

The authority of auctioneers.—*Ib.*

Interpleaders and their subject matters.—*Ib.*, Dec. 23.

Gifts by infants.—*Ib.*

Restraining libels by injunction.—*Ib.*, Dec. 30.

Directors' contracts with themselves.—*Albany L. J.*, Dec. 30.

Directors as bank speculators.—*Ib.*

Unconscionable contracts.—*Ib.*, Jan. 6.

Accidents to other than travellers on railways—Contributory negligence.—*Ib.*, Jan. 13.

Evasion of contract not to carry on business.—*Ib.*

Criminal attempts (continued).—*Irish L. T.*, 9, 16, 1882.

Contracts impossible of performance.—*Ib.*, Dec. 23.

Wigs and gowns.—*Ib.*, from *Pall Mall Gazette*.

Farming on shares.—*Central L. J.*, Dec. 15.

Liability of examiners of titles of real estate.—*Ib.*, Dec. 22.

Physicians, evidence in life insurance cases—Privilege.—*Ib.*

Evidence—Res gestee.—*Ib.*, Jan. 5, 12, 1883.

Forbearance of suit as a consideration.—*Ib.*, Jan. 5.

Proof of handwriting by comparison.—*American Law Review*, Jan., Feb.

Agreement for separation between husband and wife.—*Ib.*

The elements distinguishing the successful from the ordinary legal practitioner, and what they suggest.—*Ib.*

Auction sales.—*American Law Register*, Jan. Witness refusing to give criminating evidence.—*Ib.*

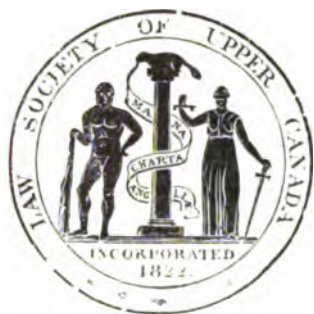
Discriminating tariffs for carriage of freight.—*Ib.* Comparative criminal jurisprudence.—*Criminal Law Review*, Jan.

We have received an advertisement and circular as to the "Portable Electric Lighter." It is claimed that this little instrument, (costing only \$5), by the mere pressure of a spring, gives an instantaneous light; that it has a burglar alarm attachment—a most useless thing, by the way, for the editor of a legal journal; that a medical battery can also be attached, which is more to the purpose, and it can be so arranged as to light up or ring a bell in a distant room, and perform various surprising feats which would have utterly subverted the solemnity of the Bench and Bar of half a century ago; but the profession of the present day is surprised at nothing; we should probably survive if the Attorney-General were to allow a session to pass without altering the procedure of the Courts or amending the Drainage Acts; in fact we cannot do better than suggest one of these instruments for the use of the Local Legislature, to throw some light on the necessity of half the Acts that we have to make ourselves acquainted with every year. We propose to get one of these instruments, and trust it may not result in our sanctum becoming the permanent residence of an aurora borealis, which the *Scientific American* tells us may now be produced to order in large quantities by an electric battery.

LITTELL'S LIVING AGE. The numbers of this excellent serial for the weeks ending March 3 and 10, contain The Brothers Henry and Thomas Erskine, *Westminster*; The Primacy of Archbishop Tait, *British Quarterly*; A Farewell Appearance, *Longmans*; Dr. John Brown of Edinburgh, and Churchyard Poetry, *Macmillan*; Mr. Gladstone's School-days, *Temple Bar*; In Alsace, Mr. Gladstone at Hawarden, and The First of the White Month, *Leisure Hour*; Some Curious Commissions, *All the Year Round*; The Humors of Examinations, and A Reminiscence of Sir Walter Scott, *Chambers'*; with the conclusion of "A Singular Case" and instalments of "For Himself Alone," and "No New Thing," and the usual amount of poetry.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely :—

William Renwick Riddell, Gold Medalist, with honours; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From	Arithmetic.
1882	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum.
1883.	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
	Virgil, Æneid, B. V., vv. 1-361.
1884.	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
1885.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar. Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

Canada Law Journal.

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APRIL 1, 1883.

No. 7.

DIARY FOR APRIL.

1. Sun. . . . *Low Sunday.*
2. Mon. . . Co. Ct. Term and Sitt. without jury begin.
3. Thurs. . Canada discovered, 1499.
7. Sat. . . Co. Ct. term ends.
11. Sun. . . *Second Sunday after Easter.* Sup. Ct. Act assented to, 1875.

TORONTO, APRIL 1, 1883.

WE have always had a high opinion of the intelligence of the officials of the Toronto Post Office, but were never really alive to their merits until now. A letter from England reached the Post Office a few days ago addressed merely, "The Editor of the leading legal publication, Toronto, Canada." It was at once forwarded to us. Incompetency might have sent it to the editor of the *Canadian Law Times*, or the editor-in-chief of the Ontario Reports, or of some other obscure publication. To the Toronto Post Office staff the address was of course amply sufficient to prevent any such blunder. We are not as yet informed whether the celebrated coloured postman had any share in this remarkable display of acuteness.

THE *Legal News*, after the lapse of three weeks, has plucked up courage to refer to our observations on the offensive article it published over the signature "R." criticising the judgment of the Supreme Court in *Grant v. Beaudry*. As our contemporary comes to hand just as we go to press we are unable to refer at any length to the writer's laborious effort to draw away attention from the points we made. We cannot at present do more than remark that silence on one of these points warrants us in supposing that "R." is simply

the first letter in the name of one of those judges whose judgment was upset by the Supreme Court, and who, in such bad taste, uses the columns of a legal journal to speak of one of the most eminent of our judges, who felt it his duty to over-rule him, in such words as these:—"Mr. Justice Gwynne blundered in his law, as is his wont." The learned judge of the Court of Queen's Bench in Quebec (if we are right in assuming that he is the writer) has blundered very considerably (whether according to his wont or not we do not care to discuss) in not letting his impropriety be forgotten, instead of again rushing into print "*rabido ore*" to his own personal identification and further discredit.

CONSOLIDATION OF MORTGAGES.

The equitable right which a mortgagee, holding two or more mortgages on different estates, is entitled to exercise under the name of "consolidation," is sometimes improperly confused with another right which it resembles, but from which it is entirely distinct, which is called "tacking."

Tacking is the union of two or more debts upon *one* estate, so as that the owner of the equity of redemption may not redeem that estate except on the terms of paying all the debts; while consolidation is the union of two or more debts respectively charged on different estates, so as that the owner of the equity of redemption in any of those estates shall not be permitted to redeem any one of the estates without redeeming all. In other words, the right of tacking is a right to charge on a mortgaged estate not only the specific debt for which the mortgage was

CONSOLIDATION OF MORTGAGES.

given as security, but also other moneys due the mortgagee in respect of costs, charges or expenses incurred by him respecting the security, or in making necessary permanent improvements on the mortgaged property, or in protecting his security by the redemption of prior charges, or otherwise. As against the heir or beneficial devisee of a deceased mortgagor, the mortgagee would seem also to be entitled to tack to his mortgage debt, any judgment, specialty or even simple contract debt, due to him from the deceased mortgagor: (*McLaren v. Fraser*, 17 Gr. 533; *Re Haselfoot's Estate*, 13 Eq. 327, Coote 810.) But this right cannot be insisted on to the prejudice of other creditors; and this right to tack debts which are not a lien on the land can only be enforced as against the representatives of a deceased mortgagor who died entitled to the equity of redemption; as between mortgagee and mortgagor themselves there is no such right: (*Ferguson v. Frontenac*, 21 Gr. 188.)

Formerly, a subsequent encumbrancer, without notice of a prior encumbrance at the time of making his advance, might have cut out such prior encumbrance by acquiring the legal estate, or the best right to call for it. To this legal title he might tack his subsequent encumbrance, and resting on the principle that where the equities are equal the law must prevail, might therefore gain priority over the *mesne* encumbrance. This latter right, however, is now, as regards registered encumbrances, virtually abolished in Ontario by the Registry Act, R. S. O. c. 111, s. 81; but except in so far as the right of tacking conflicts with the provisions of the Registry Act it may still be enforced as formerly.

The right of consolidation, on the other hand, is an equity which a mortgagee, holding two or more mortgages made by the same mortgagor on different estates, has to insist that any party coming to redeem, shall not be permitted to redeem any of the mortgaged estates without redeeming all. This right of consolidation, notwithstanding what is said

in *The Dominion S. & I. Society v. Kittridge*, 23 Gr. 631, to the contrary, is one that is within the provisions of the Registry Act, s. 81, and cannot, therefore, be insisted on as against an assignee of the equity of redemption claiming under a registered deed without actual notice: (*Brower v. Canada Perm. L. & S. Co.*, 24 Gr. 509; *Johnston v. Reid*, 29 Gr. 293; *Miller v. Brown*, 19 C. L. J. 54). In *Miller v. Brown*, also, Proudfoot, J., held R. S. O. c. 111, s. 81, to be retrospective in its operation.

It is a right, also, which is subject to certain other limitations and exceptions. Thus where one of the mortgaged estates (e.g., a leasehold, or estate for life), has ceased to exist, there is no longer any right to consolidate a debt thereby secured, with any other mortgage debt: (*Re Raggett*, 44 L. T. N. S. 4; 50 L. J. Chy. 187). Neither can a mortgage of realty be consolidated with a mortgage of chattels, so as to throw the debt secured by the former on the latter, as that would be an invasion of the Bills of Sale Act, R. S. O. c. 119: (*Chesworth v. Hunt*, 5 C. P. D. 266; 42 L. T. N. S. 774; 49 L. J. C. P. 507). Neither is consolidation allowed where prior to the creation of the second mortgage, or prior to the two mortgages coalescing in one hand, the mortgagor had assigned his equity of redemption in one of the properties: (*Mills v. Jennings*, 13 Ch. D. 639, which afterwards came before the House of Lords under the title of *Jennings v. Jordan*, L. R. 6 App. C. 698; 45 L. T. N. S. 593; *Harter v. Coleman*, 19 Ch. D. 630; 46 L. T. N. S. 154; 51 L. J. Ch. 481).

At one time it was held that an assignee of an equity of redemption took, subject not only to the equities of the mortgagee then subsisting, but also to the potential right of the mortgagee to consolidate the mortgage of which the equity of redemption was assigned, with any other mortgages made by the same mortgagor, which might at any time afterwards come into his hands; but this view of the law which was laid down in

CONSOLIDATION OF MORTGAGES—RECENT ENGLISH DECISIONS.

Tassell v. Smith, 32 L. T. O. S. 4; *Vint v. Padgett*, 31 L. T. O. S. 21; 2 De G. & J. 611; and *Bevor v. Luck*, 5 Eq. 537, is now overruled by the case of *Jennings v. Jordan*, to which we have above referred.

The right of consolidation may be claimed by the mortgagee as well in a suit to foreclose, as in one to redeem: (*Johnston v. Reid*, 29 Gr. 293; *Watts v. Symes*, 1 D. M. & G. 240; *Selby v. Pomfret*, 1 J. & H. 336; S. C. 3 De. G. F. & J. 585). But in an action for foreclosure against a purchaser of the equity of redemption of one of the estates, the plaintiff mortgagee has no right to consolidate any mortgage not in default: (*Cummins v. Fletcher*, 14 Ch. D. 699; 42 L. T. N. S. 859; 49 L. J. Ch. 117, 563); and it would seem from the principles laid down in that case, that the same rule applies where the action is against the mortgagor himself. But in an action for redemption, it would seem, on principle, that it is not necessary that all the mortgages should be in default in order to entitle the mortgagee to consolidate them.

In an action for foreclosure or sale by a prior encumbrancer, a subsequent incumbrancer may consolidate: (*Merritt v. Stephenson*, 7 Gr. 22; *Ross v. Stevenson*, 7 P. R. 126).

The right of consolidation exists as we have seen by reason of two or more mortgages made by the same mortgagor, coming to the same hand, and it is not at all necessary that they should have originally been made to the same person.

The right to consolidate as against a purchaser of the equity of redemption in one of the estates may be lost by the conduct of the mortgagee in neglecting to give notice of his claim to consolidate, even though the purchaser has actual notice of the second mortgage: *Dominion S. and I. Co. v. Kittridge*, *supra*.

Although in a redemption suit a mortgagee may have a right to consolidate all the mortgages held by him against the same mortgagor, even though some of them be not in default; yet the plaintiff in an action for

redemption has not a reciprocal right to insist on redeeming any mortgage not in default, nor yet any mortgage of which he is not the owner of the equity of redemption, even though it be one which the mortgagee, if he chose, might claim the right to consolidate. The privilege of consolidation being an equity which the mortgagee may insist on if he pleases, but which the mortgagor, or those claiming under him, cannot compel him to submit to. Thus, although the mortgagee may, if he pleases, treat two distinct mortgages as one security as against the mortgagor, yet the latter cannot insist on their being treated as one as against the mortgagee. In *Bald v. Thompson*, 16 Gr. 177, the mortgagee lent \$2,000; to secure which, he took two mortgages on different properties to secure \$1,000 each. He foreclosed one of these mortgages and afterwards parted with the property, and it was held that his so doing was no bar to a subsequent action for foreclosure of the other mortgage; although, if the two mortgages had been in fact one security, the mortgagee's parting with one part of the property under such circumstances would have been an obstacle in the way of foreclosing the residue: (*Gowland v. Garbutt*, 13 Gr. 578; *Munsen v. Hauss*, 22 Gr. 279).

RECENT ENGLISH DECISIONS.

A portion of the February number of the *Law Reports* for the Chancery Division still remains to be noticed.

SPECIFIC PERFORMANCE—AGENT'S MISREPRESENTATION.

Mullens v. Miller, p. 194, shows that misrepresentation by the agent of the vendor of real estate as to matters affecting the value of the property sold, is a good defence to a suit for specific performance. Bacon, V.C., in his judgment, says:—"A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its

RECENT ENGLISH DECISIONS.

actual situation, and, if he thinks fit, to represent its value. That is within the scope of the agent's authority; and when the authority is changed, and instead of being an authority to let it becomes an authority to find a purchaser, I think the authority is just the same. I think the principal does thereby authorise his agent to describe, and binds him to describe truly, the property which is to be the subject disposed of; he authorizes the agent to state any fact or circumstance which may relate to the value of the property."

LAW OF MORTMAIN—INTEREST IN LAND.

There is little necessity to dwell long on the next case, *Jervis v. Laurence*, p. 202. The main point decided was that an assignment by way of mortgage of a portion of the rates levied on the occupiers of certain lands under an Act for the improvement of a certain estate, which rates were, under the Act, recoverable by distress, did not create an interest in land within the meaning of the Mortmain Act. Bacon, V.C., observes:—"A man who has a power of distress has no interest in the land. A landlord or lessor, while the lease subsists, has no present interest in the land; but he has a right to go, by common law and under the Act relating to distress of William and Mary, (2 W. & M. c. 5,) on to the land and then and there to take all such chattels as can properly be a subject of distress."

COVENANT TO BUILD—RUNNING WITH THE LAND.

The next case, *Andrew v. Aitken*, p. 218, may also be dismissed in a few words. Land was granted in fee in consideration of a rent-charge, and the deed of grant contained a covenant to build houses on the land, at the request of the grantor, the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required. Fry, J., held that such a covenant was an unusually restrictive one, and, therefore, it was misrepresentation to say that the land was not subject to any covenants "un-

usually restrictive." He also said it might be that although the assignee of the grantee of the land was not liable affirmatively on such covenant, he might be called on to allow the house to be built in accordance with the covenant.

INJUNCTION.

The next case, *Attorney-General v. Acton Local Board*, p. 221, is a case in which an injunction was granted in the absence of proof of substantial damage, on the ground that the defendants by their pleading claimed a right to continue doing that which the Court held they were not entitled to do.

PUBLIC BODIES—PRIVATE RIGHTS.

This case is somewhat similar to that of *Northwood v. Township of Raleigh*, in which Boyd, C., recently delivered judgment, and which decides that the common law rights and liabilities in respect to the over-flowing of lands, are not affected by our Drainage Acts. Similarly, *Attorney-General v. Acton Local Board*, decides that notwithstanding the obligation imposed on a local board by the Imp. Public Health Act, 1875, to drain the district, their right to send the sewage of their district, directly or indirectly, into the sewers belonging to the sanitary authority of an adjoining district, is, in the absence of express enactment or agreement, no higher than the right of a landowner to send sewage from his land, on to the land or into the drains of a neighbouring landowner. Fry, J., says:—"I consider it to be well established that local boards are bound to perform their statutory duties without injury to their neighbours. They cannot create a nuisance affecting a neighbour, and in my judgment, they cannot cast upon a neighbour a greater burden than he is already bound to bear."

WILL—CONSTRUCTION—DEATH.

The whole point of the next case requiring notice here, *Elliott v. Smith*, p. 236, appears in the following extract from the judgment (Fry, J.):—"It appears to me that by a series of cases, it has been decided that where there

RECENT ENGLISH DECISIONS.

is a gift to A., and 'if A. dies,' to B., that means a gift to B., if A. dies before the testator. I must apply that rule to this case." In this case, both the legatee and the testator went down in the *Princess Alice* steamship together, and there was nothing to show which was the survivor, and it was held that as it was not shown that the legatee died before the testator, the legacy fell into the residue.

WILL—POWER OF APPOINTMENT.

In the next case, *Willoughby Osborne v. Holyoake*, p. 238, a testatrix made her will, having at the date of making it, general powers of appointment over certain real and personal property, which was subject to gifts over in default of appointment. By her will she desired that her will should operate upon all property in which she had any interest, or over which she had any power of appointment or disposition; and she left all her property between A., B. and C. A. died in her lifetime. The question now was, whether the testatrix had by her will merely exercised her powers of appointment, in which case the share of A. would go over as in default of appointment, or whether she had devised the property subject to the power as her own, in which case there was an intestacy. Fry, J., says in his judgment, that the true mode in which Courts have to determine cases of this description, is undoubtedly expressed in the words of the Vice-Chancellor of Ireland, in *Re De Lusi's Trusts*, 3 Ir. L. R. 232:—"The question in all cases of the class now before me, is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed." And he decided that on the construction of the will in the case before him the testatrix had made the property her own, so that on the death of A. in her lifetime the gift, even in default of appointment, did not take effect.

NATIONALITY—BRITISH SUBJECT.

Of the next case, *DeGeer v. Stone*, p. 243, it is only necessary to state the result arrived at, which was, that the *status* of natural-born British subjects, which, by the Acts 7 Anne, c. 5, 4 George II, c. 21, and 13 George III. c. 21, is conferred on children and grandchildren born abroad of natural-born British subjects, is a merely personal *status*, and is not, by these Acts, made transmissible to the descendants of the persons to whom that *status* is thereby given, and there is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects forever.

TRUSTEES.

The next case, *Worcester City Banking Co. v. Blick*, p. 255, illustrates the rule laid down in the well known case of the *German Mining Co.*, 4 D. M. & G. 19, that a trustee who *bona fide*, without any intention of benefitting himself, advances money of his own for the purposes of the trust estate, has a right to be indemnified. The case was simply one of a trustee who, without the slightest chance of benefit to himself, for the convenience of his *cestui que trust*, advanced a sum of money of his own to complete a purchase which otherwise was entirely within the trust, and within his power to make. Kay, J., held that he had a right to be indemnified in respect of this advance, and that notwithstanding the rule that where a trustee mixes his own money with trust funds, the whole heap resulting from that admixture belongs to the trust. As to this latter rule he observes:—"In strictness it only ought to be applied when it is impossible to make out how much was the trustee's money. Here there is no difficulty at all upon this point." And he held that though the trust estate had a first charge upon the purchased property for the amount of the trust moneys expended in purchasing it, the trustees had a right to indemnity subject to that right; and there was no reason why he should wait for his indemnity until the trust

RECENT ENGLISH DECISIONS—LAW SOCIETY.

estate had been turned again into money under the trust. As to this last point he says:—"It would be extremely harsh upon trustees, who are treated with all proper severity and quite harshly enough by the Rules of this Court, if, when they have a right of indemnity, it should be held that they are not to be allowed to enforce that right of indemnity until the estate happens to be turned into money under the trust contained in the settlement. I do not think there is any such rule. I think, if a trustee has a right of indemnity, he has a right to come to this Court to enforce it."

LUNATICS—CHANCERY—JURISDICTION.

In the next case, *Wilder v Pigott*, p. 263, Kay, J., asserts the jurisdiction of the Court of Chancery to bind the equitable interests of lunatics not so found by inquisition.

INFANT WIFE—CONFIRMATION OF SETTLEMENT.

This case also shows that a *feme covert* can during her coverture confirm a settlement of her property made during her infancy.

MARRIAGE SETTLEMENT—SEPARATE USE.

The last case in this number calling for notice is *Re Allnutt, Pott v. Brassey*, p. 275. The point decided appears a simple one, and is sufficiently stated in the head note. By an ante-nuptial settlement, the husband and wife covenanted with the trustees to settle all property to which the wife then was or during the coverture she or her husband in her right should become entitled by devise, bequest, or otherwise, "for any estate or interest whatsoever." During the coverture, the wife's father died, having by his will devised and bequeathed a moiety of his residuary real and personal estate to her "for her separate use," independently of any husband." Chitty, J., held that the moiety was bound by the covenant.

This completes the February numbers of the *Law Reports*.

A. H. F. L.

LAW SOCIETY.

HILARY TERM.—46 VICT., 1883.

THE following is the *resumé* of the proceedings of the Benchers during Hilary Term, published by authority:—

February 5th, 1883.

Present—The Treasurer, and Messrs. Crickmore, Bethune, Ferguson, Leith, Hoskin, McMichael, Moss, Read, Murray, S. H. Blake, and Kerr.

During this term the following gentlemen were called to the Bar, namely—William Renwick Riddel (gold medalist, with honors), Louis Franklin Heyd, William Burgess the younger, John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Casseles.

The following gentlemen received certificates of fitness, namely—W. R. Riddel, A. E. H. Creswick, C. C. McCaul, A. Mackenzie, L. F. Heyd, R. A. Porteous, J. J. O'Meara, W. A. Geddes, W. R. Cavell, G. T. Ware, J. F. Canniff, P. S. Carroll, H. H. Robertson, E. E. Kittson, R. K. Cowan, W. G. Wilson, A. N. Duncombe, J. Dickenson, J. A. Palmer, J. W. Binkley, J. G. Wallace, F. Marskell, B. C. McCann, W. G. Shaw.

The following gentlemen passed the First Intermediate Examination, namely—H. J. Kelly (with honors), J. Thacker. Mr. Kelly was awarded First Scholarship, Mr. Thacker was awarded Second Scholarship. The following gentlemen passed, namely—T. D. J. Farmer, J. F. Williamson, W. Knowles, D. Faskin, J. Armstrong, F. E. Griffiths, T. B. Lafferty, A. J. Flint, H. A. Fairchild, J. Shilton, W. R. Smythe, W. E. Mitchell, J. M. Duggan, W. D. McPherson, G. E. Martin, A. M. Walton, A. H. Gross, C. B. Jackson, D. M. Howard, J. A. McAndrew, O. E. Fleming, P. F. Young, S. J. Young.

The following gentlemen passed the Second Intermediate Examination with honors, namely—C. A. Masten, First Scholarship; F. H. Keefler, Second Scholarship; H. H. Collier, Third Scholarship. The following gentlemen passed, namely—F. J. Palmer, H. J. Wickham, J. C. Grace, S. C. Smoke, J. Y. Cruikshank, F. L. Brooke, D. Armour, A. Sutherland, N. McMurchy, A. E. Grier, E. Bell, D. Urquhart, J. W. McCullough, W. M. Shoebotham, S. O. Richards, J. R. Miller, W. F. Church, J. S. Garvin, W. F. Sorley, W. H. Wardrope, G. Weir, W. A. Werrett.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

LAW SOCIETY.

GRADUATES—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

MATRICULANTS—William H. Wallbridge.

JUNIORS—Joseph Tweedale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Handsford, Albert Edward Trow, Ralph Robb Bruce, Edwin Harvey Jackes, William Herbert Bentley, Arthur Edward Watts.

ARTICLED CLERKS—William Sutherland Turnbull passed his examination as an Articled Clerk only.

The Report of the Committee on Discipline, on the complaint of Zebulon Landon, against a barrister and solicitor, was presented by the chairman of that Committee, and ordered to be considered on 6th February.

The Report of the Finance Committee was presented by the Chairman, and ordered to be considered on 6th February.

The Library Committee presented their Report, which was ordered to be considered on 6th February.

A letter from Mr. Glass was presented, resigning his seat as a Benchet.

Ordered, that a call of the Bench be made for Friday, 16th February, to elect a Benchet in the place of Mr. Glass.

The case of a Solicitor who, not being a Barrister, advertised himself as such, was referred to the Discipline Committee for enquiry and report.

February 6th, 1883.

Convocation met.

Present—The Treasurer, and Messrs. MacLennan, Mackelcan, Crickmore, Murray, Kerr, Moss, Martin, Ferguson, S. H. Blake, and Read.

The Report of the Select Committee on the subject of unlicensed conveyancers, was presented by Mr. Moss, as follows:—

The Committee appointed to consider the questions of unlicensed conveyancing, sales under powers contained in mortgages, and agents practising in Division Courts, beg leave to report as follows:—

1. As authorized by Convocation, the Committee met and held a conference with a number of members of the legal profession, who are also members of the Legislature, representing both sides of politics, with reference to the matters referred to the Committee.

2. After a lengthened discussion, those gentlemen expressed their opinion to be that it would not be feasible to get any legislation during the session then being held, and they would not advise that any attempt be made at present.

3. With regard to agents practising in Division Courts, they thought that a representation from Convocation to the County Court Judges against allowing fees to agents, would be acted upon in many cases.

(Signed) CHARLES MOSS,
Hilary Term, 1883. *Chairman.*

The Report was read and received.

Ordered for consideration forthwith, and adopted.

The consideration of the Report of the Committee on Discipline in the matter of the complaint of Zebulon Landon, was postponed to the next meeting of Convocation.

The Report of the Finance Committee was brought up for consideration, and was adopted as follows:—

REPORT.

The Finance Committee beg leave to report as follows:—

1. Pursuant to their Report of the 14th February, 1879, approved by Convocation, they have caused the annual abstract of receipts and expenditure up to 31st December, 1882, to be prepared, and they submit it herewith to Convocation.

2. Pursuant to the 3rd clause of the above Report the Standing Committees on Reporting Legal Education, County Libraries Aid, and the Library, have prepared estimates of the probable Receipts and Expenditure for the year, in respect of their branches of the business, and their estimates have been submitted to this Committee.

3. Adopting mainly the views of the several Committees as to the probable Receipts and Expenditure, the Committee beg to summarize the estimates for the current year as follows:—

ESTIMATED RECEIPTS AND EXPENDITURE.

RECEIPTS.

Certificate and Term Fees, including arrears, fines and costs	\$17,500 00
Notice Fees	550 00
Solicitors' Examination Fees	4,650 00
Students' Admission Fees	6,500 00
Call Fees	7,000 00
Interest and Dividends	2,700 00
Government payment for heating, lighting, and water	4,250 00
Sundries—	
Fees on Petitions, Diplomas, and Certificates	120 00
For Reports sold	375 00
Commission and Fees on Telegraph and Telephone	328 00
	\$43,973 00

EXPENDITURE.

Reporting:—	
Salaries	\$7,400 00
Postage	103 00
Printing	5,604 21
Notes of Cases	300 00
Advertising	6 00
Appropriation for Digest	500 00
Election Reports	3,060 00
	\$16,973 21
Examinations:—	
Salaries	\$3,200 00
Scholarships	1,600 00
Printing and Stationery	275 00
Advertising	25 00
Examiners for Matriculation	300 00
Law Journal	100 00
Medals	100 00
	5,600 00
Library:—	
Books, binding and repairs	2,000 00

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General Expenses—		
Salaries, Secretary, Sub-Treasurer and Librarian	2,000 00	
Assistants	1,200 00	
Housekeeper	360 00	
	<u>3,560 00</u>	
Lighting, Heating Water and Insurance:—		
Engineer and Assistant	600 00	
Gas rate	700 00	
Water rate	800 00	
Weighing Coal	10 00	
Fuel	2,900 00	
Repairs to Apparatus	350 00	
Carting coal and cutting wood	100 00	
	<u>5,460 00</u>	
Grounds:—		
Gardener and Assistant	420 00	
Tools	5 00	
Cartage	60 00	
Labour	250 00	
Snow Cleaning	40 00	
	<u>775 00</u>	
Sundries:—		
Auditor, \$100; opening library at nights, \$116	216 00	
Postage, \$20; Stationery, \$200	220 00	
Telephone rent	100 00	
Law costs	800 00	
Repairs, \$400; Oiling floors, \$15 ..	415 00	
Removing matting, \$20; clocks, \$10 ..	30 00	
Ice, \$15; Term lunches, \$500	515 00	
Cleaning windows, \$20; Guarantee Co., \$20	40 00	
Resume, \$40; Dusting books, \$10 ..	50 00	
Telephone operator, \$432; Tel. boy, \$96	528 00	
Telephone Messages	8 00	
Petty charges, \$25; P. O. Box, \$6 ..	31 00	
Fitting up wire-faced shelves	35 00	
Furniture repairs \$30; New furniture, \$50	80 00	
Printing, \$50; Substitute for Williams during his illness, \$164	214 00	
Insurance on stock of reports at Rowsell's	90 00	
	<u>3,372 00</u>	
Extraordinary Expenditure:—		
Carpets and Curtains connected with improvements	350 00	
	<u>350 00</u>	
County Library Aid:—		
Annual Grants—		
Hamilton, \$388; Middlesex, \$240 ..	528 00	
Brant, \$76; Frontenac, \$72	148 00	
Peterboro', \$92; Bruce, \$80	172 00	
Supplementary Initiatory Grants—		
Frontenac	120 00	
Bruce	126 00	
Peterboro'	132 00	
Initiatory Grants—		
Ontario	267 00	
Probable applications from new libraries	500 00	
	<u>2,002 00</u>	
	<u>\$40,892 21</u>	

As the new hall and the improvements connected therewith are now completed and paid for, the Committee think it convenient to give a statement of the financial condition of the Society; and for that purpose, to show the receipts and expenditure for the last four years.

(1) On the first day of January, 1879, the assets of the Society comprised:—

1. The grounds.	
2. The old building.	
3. The library of books.	
4. The pictures and furniture.	
5. The surplus stock of Canadian Reports.	
Cash assets, viz.:	
6. { Dominion Stock	\$50,000 00
{ Cash in Bank	13,148 25
{ Savings Bank Departments	5,800 00
	<u>\$68,948</u>

(2) The receipts and expenditure for the last four years have been as follows:—

1879—Receipts	\$45,348 70	
Expenditure	34,746 14	
Surplus		\$10,602 56
1880—Receipts	\$43,293 34	
Expenditure	37,059 43	
Surplus		\$6,233 91
1881—Receipts	\$49,731 70	
Expenditure	38,144 21	
" on building, etc.	32,865 88	
Over-expenditure		\$21,278 39
1882—Receipts	\$46,866 25	
Expenditure	40,777 32	
Expenditure on building and furniture	16,965 55	
Over-expenditure		\$10,876 62
Balance at 31st December, 1882:—		
Debentures	\$50,000 00	
Bank balance	3,606 00	
Cash in hand	22 81	
		<u>\$53,629 71</u>

The Assets of the Society on the first of January, 1883, comprised:—

1. The grounds; 2. The old building; 3. The Library of books, consisting of (a) The Library as at first January, 1879; (b) Additions to the Library since first January, 1879, cost, \$9,615 22; 4. The pictures and furniture consisting of (a) Those in existence first January, 1879; (b) Additions to pictures and furniture since January 1st, 1879, \$4,749 30; 5. The surplus stock of Canadian Reports, consisting of (a) Stock, January, 1879; (b) Additions to surplus since 1st January, 1879; Selling price, \$11,280 60, cost, \$2,820 15; New building and improvements in old building, \$48,096 95; cash assets as above, \$53,629 71. In addition to which has been spent on additions to County Libraries since 1st of January, 1879, \$3,700.

It will be observed that the cash assets have diminished as follows:—

Cash Assets, 1st January, 1879	\$68,948 25
" 1st January, 1883	53,629 71
Diminution	<u>\$15,318 54</u>

But, on the other hand, other assets have increased as follows:—

Additions to Library	\$9,615 22
Additions to surplus stock of Reports	2,820 15
Additions to pictures and furniture	4,749 30
New building and improvements to old building	48,096 95
Total	<u>\$65,281 62</u>
Deduct diminutions in cash assets	15,318 54
Net improvements in assets at cost price	49,963 08
Irrespective of aid to County Libraries	<u>3,700 00</u>

ABSTRACT OF BALANCE SHEET, 1882.

RECEIPTS.		
Certificate and Term Fees		\$17,827 50
Notice Fees	606 00	
Less Fees returned	2 00	
		<u>604 00</u>
Attorneys' Examination Fees	6,445 00	
Less Fees returned	1,070 00	
		<u>5,375 00</u>
Students' Admission Fees	8,200 25	
Less Fees returned	650 00	
		<u>7,550 25</u>
Call Fees	10,580 00	
Less Fees returned	2,715 00	
		<u>7,865 00</u>
Interest and Dividends		2,752 54
Government payment for Heating, Lighting, and Water		4,250 00
Received for Reports sold		<u>450 88</u>

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Sundries:—		
Received Telegraph Commission and Fees on Telephone messages...	191	08
Fees for petitions	176	50
Balance	10,876	62
EXPENDITURE.		
Reporting:—		
Salaries	\$7,346	57
Postage	200	32
Printing	6,417	17
Supreme Court Reports	2,025	00
Notes of Cases	259	87
	\$16,248	92
Examinations:—		
Salaries	3,061	48
Scholarships	1,480	00
Printing and Stationery	229	30
Advertising	44	70
Engrossing Diplomas and Certificates	4	60
Examiners for Matriculation	290	50
Law Journal Account	30	00
Prize	25	00
	5,165	58
Library:—		
Books, Binding and Repairs		
General Expenses—Salaries:—		2,256 72
Secretary, Librarian, and Sub-Treasurer	2,000	00
Assistants	1,266	70
Housekeeper	292	25
	3,558	95
Lighting, Heating, Water and Insurance:—		
Engineer and Assistant	565	00
Gas	680	10
Water	846	97
Insurance	211	14
Weighing Coal	10	00
Fuel	4,930	04
Repairs to Apparatus	341	86
Carting Coal and Cutting Wood ..	124	42
Sifter	6	00
	5,724	53
Grounds:—		
Gardener and Assistant	400	00
Tools	4	65
Cartage	60	15
Labour	209	38
Snow Clearing, \$36.94; Gravel, \$278.75	314	62
	988	87
Conversations	1,396	00
County Library Aid	1,560	00
Sundries:—		
Auditor, \$100, Postage, \$19.14	119	14
Advertising, \$211; Stationery, \$243.50 ..	454	50
Law Costs, \$933.39; Portraits, \$650 ..	1,483	39
Picture frames	145	00
Repairs, \$246.66; Term Lunches, \$543.55 ..	790	21
Clocks, \$10; Guarantee Co., \$20 ..	30	00
Rubber Stamp, \$2.50; Oiling floors, \$3 ..	85	50
1. 15; Cleaning windows, \$34.60 ..	49	60
Bell Telephone Company	100	00
Telephone Operator	466	34
Telephone Messages, \$7.21; Shifting books, \$15.73 ..	22	94
Petty charges, \$25; Labour, \$30.68 ..	55	77
Taking up matting and carpets	32	70
Painting, \$33.39; Resume, \$30	63	39
P. O. Box, \$4; Locks and Keys, \$21.42 ..	25	42
Furniture repaired	30	35
	4,054	25
	\$40,953	82
	16,965	55
	57,919	37
Expenditure on New Building		

Audited and found correct.

(Signed) HENRY W. EDDIS,
Auditor.

TORONTO, Feb. 1883

While congratulating the Society on these results, the Committee think it necessary to point out that the estimated expenditure for the current year will approximate closely to the estimated income.

It is true that this is to be partly accounted for by the extraordinary expenditure for the Election Reports.

But making allowances for this expenditure, the income and expenditure, as estimated, too nearly balance; and in view of the great complaints on the subject of business, the emigration to Manitoba, and the large increase in the past in the numbers of the profession, the Committee feel that it would be prudent to limit as far as possible the expenditure of the Society in the future, and to aim at the creation of a contingent fund, as formerly proposed, of at least \$10,000, by means of the accumulation of the interest on investments.

In this view, it has been suggested that it may be well to reduce the expenditure on Supreme Court Reports by subscribing only for copies for the libraries, and arranging that in the regular reports should be published the reports of Ontario Appeals to the Supreme Court in cases of interest.

D. B. READ,
Chairman Finance Committee.

Ordered that the last paragraph, as to the Supreme Court Reports, be referred to the Committee on Reporting for enquiry and report.

The Report of the Library Committee, presented yesterday, was brought up for consideration, and is as follows:—

REPORT.

The Library Committee beg leave to report as follows:—

1. Attached is a list of books that have disappeared from the Library, the whereabouts of which the librarian, after search and enquiry, is unable to discover. By reference to the list it appears that most of these books are upon the curriculum, but they do not appear to have been loaned to students.

2. The Committee think that, with a view to securing if possible the return of these books, it would be advisable to notify the students that unless the books now out are returned within three months Convocation will have to consider the expediency of abolishing the privilege of borrowing books.

3. The librarian reports that in order to supply the present demand of students for books on the curriculum, it is necessary to keep six copies of each book required to be read for the intermediate examinations, and four copies of each required to be read for the finals. Attached is a list of such text books from which it appears that a large number of new volumes are required to make up the above number.

4. The Committee suggest that all books on the curriculum ought to be stamped and mark-

LAW SOCIETY.

ed so as to prevent the destruction of their identity as the property of the Society, and that in the future great strictness should be observed in seeing that the books are returned by the days named in the receipts given for them.

5. With regard to opening the library at nights, the librarian states, and it appears from the returns, that except in very infrequent instances no advantage has been taken of this privilege by others than students, and that they come in small numbers merely to read the text books upon the curriculum, and some even bring their own books, merely using the library as a reading-room.

The Committee think that the opening of the library at nights should be abolished after the close of the present term.

Mr. Daley's engagement terminates on the 17th of this month. The Committee recommend that he be re-engaged until the end of the month, after which the librarian thinks his services may be dispensed with.

The Committee recommend that students requiring books for loan or for their own use in the library from the locked cases, be limited as to their applications to the following hours, namely: between 10 and 10:30 a.m., and between 3:30 and 4 p.m.

Signed, CHARLES MOSS.

Hilary Term, 1883.

The report was adopted.

Missing Books. — Broom's Common Law, Broom's Legal Maxims, Broom's Constitutional Law, Byles on Bills, Benjamin on Sales, Best on Evidence, Blackstone, Vol. I., Anson on Contracts, Greenwood on Conveyancing, Harris' Criminal Law, Walkem on Wills, Leith's Blackstone, old edition, Leith's Blackstone, new, Holmsted's J. A., Leith's Williams, Smith on Contracts, Smith's Mercantile Law, Leggos' Forins, 2nd edition, Lewis' Equity Pleading, Smith's Com. Law, Taylor on Titles, 1873, Stephens on Pleading, Williams on Real Property, MacLennan's J. A., Taylor & Ewart's J. A., Pollock on Contracts, Hawkins on Wills, Smith's Equity, Students' Guide, Snell's Equity, Taylor's Equity, Taylor's Chy. Orders, Underhill on Torts, Cunningham and Mattinson, Wharton on Inn-keepers, Taylor on Landlord and Tenant, Leake on Contracts, Lewin on Trusts.

Students' Books now in the Library — 1 Walkem, 2 Broom's Common Law, 3 Broom's Legal Maxims, 3 Darts, 2 Haynes' Equity, 2 Greenwood, 1 Byles, 4 Leith's B. 1 Leith's B. N. S., 7 Leith's R. P. S., 2 Holmsted's, 4 Leith's Williams, 2 Smith's Contracts, 3 Benjamin, 2 Smith's Mercantile, 2 Powell, Smith's Common Law, 2 Taylor on Titles, 1869; 2 Taylor on Titles, 1873; 1 Stephen, 2 Williams' Rl., 3 Williams' Pers., 3 MacLennan, 2 Taylor and Ewart, 4 O'Sullivan, 2 Taswell Langmead, 2 Theobald,

2 Bests, 1 Walkem, 1 Pollock, 1 Hawkins, 3 Snell's Eq., Blackstone, Vol. I., 2 Story's Eq., 1 Taylor's Eq., Taylor's Chy. Orders.

Saturday 10th February, 1883.

Present—Messrs. Crickmore, Leith, Moss, J. F. Smith, Murray, MacLennan, Read, Foy, McMichael, Kerr, Ferguson.

In the absence of the treasurer Mr. MacLennan was elected chairman.

The Report of the Committee on Reporting was presented by Mr. MacLennan.

The Report was received, ordered for immediate consideration, and was adopted as follows :

REPORT OF REPORTING COMMITTEE.

The Committee on Reporting beg leave to report as follows :—

The Committee are happy to state that Mr. Lefroy, the reporter for the Chancery Division, has recovered from his serious illness, and is now vigorously engaged in his duties, and they are confident he will, in a very short time, bring up the arrears caused by his illness.

The Registrar of the Chancery Division and the other officers of that Division have very kindly taken a note of all judgments delivered during the illness of Mr. Lefroy, so that no decision of importance will be overlooked.

There are still a number of cases (about twenty-six) which ought to be brought out by Mr. Grant to complete volume twenty-nine of the Chancery Reports, as to which he states there are various difficulties which have caused delay. The Committee hope that these cases may soon be issued, and the volume completed. There are about fifty-six cases of Mr. Lefroy's which are in type, and which may be brought out in a short time.

The work in the Queen's Bench and Common Pleas Divisions is, as usual, thoroughly well attended to and up to time.

Mr. Harman has completed the arrears of Mr. Tupper's work, and he has also prepared the index of volume six, which is now ready to issue.

The work in the Court of Appeal is in a forward state, but there are six cases which have been in print since October which are not yet issued, although a number of more recent cases have been published.

The practice reporting is also well attended to, thirty-nine cases have been published since last term, and there are at present thirty other cases in type and in an advanced stage. The editor has informed the Committee that the preparation of the Digest is now in progress, and will be proceeded with as rapidly as possible.

Signed, JAMES MACLENNAN,

February 10th, 1883.

Chairman.

The consideration of the Report of the Discipline Committee, on the complaint of Mr. Landon, was ordered to stand till Friday, 16th instant

LAW SOCIETY—SELECTIONS.

The Secretary submitted the list of solicitors who have taken out their annual certificates pursuant to the standing order.

Mr. Moss, seconded by Mr. Smith, moved pursuant to notice—That the Secretary be directed to draw the attention of the Judges and Junior Judges of the County Courts to the practice under the Division Courts' Act, 43 Vict. Cap. 8, sect. 16, of allowing counsel fees to agents, not being barristers or solicitors, appearing before the Judges in Division Court causes, and to represent to them that the allowance of such fees to such agents is very injurious to members of the profession, and to request their consideration of the question whether it is desirable that they should in any case exercise the discretion vested in them in favour of agents not being barristers or solicitors.

The motion was carried.

Mr. Read, Q.C., seconded by Mr. Moss, Q.C., moved that—The Benchers of the Law Society in Convocation in affectionate remembrance of Kenneth Mackenzie, Esq., Q.C., who, before his appointment to the position of Judge of the County of York, was for several years Benchers of this Society, place on record on the minutes of Convocation this expression of their feelings of regard for him during his life-time, of regret at his demise, and of condolence and sympathy with his widow and family in their bereavement.

Ordered that the Secretary be directed to send a copy of the above resolution to Mrs. Mackenzie. Carried unanimously.

Signed, JAMES MACLENNAN,
Chairman.

Convocation adjourned.

Friday, 16th February.

Present — Messrs. Crickmore, Hudspeth, Smith, Ferguson, Foy, Britton, Leith, Maclellan, Mackelcan, Moss, Hoskin, Murray, S. H. Blake, Read. Mr. Maclellan in the chair.

Mr. Hoskin, from the Discipline Committee, reported that a *prima facie* case is shown against two solicitors upon the charges made by Mr. Grace, and recommended that the charges be enquired into.

The report was received, ordered for immediate consideration, and adopted.

The petition of Mr. Grace was referred to the Discipline Committee for enquiry.

Convocation proceeded to consider the report of the same Committee in the case of Zebulon Landon against a barrister, which stood over for consideration until to-day.

Mr. Hoskin, seconded by Mr. Leith, moved the adoption of the report.

The report was adopted.

Mr. Hoskin moved that a copy of the report be transmitted both to the complainant and to the barrister in question, by the secretary.

Mr. Hudspeth seconded the motion, which was carried.

Mr. H. C. R. Becher was unanimously elected a Benchers in the place of Mr. Glass resigned.

Mr. Murray gave notice that he would on the first day of Easter Term next, move that the examination of Mr. William Clive Atkinson be allowed to stand as passed, and that a certificate be issued to him in said Easter Term next.

On the motion of Mr. Maclellan it was ordered that Mr. Harman be paid the sum of one hundred dollars for the preparation of the index to volume six of the Appeal Reports, in pursuance of the order of Convocation made last term.

Convocation adjourned.

SELECTIONS.

Hull v. Bartlett is a recent decision of the Connecticut Supreme Court of Errors, illustrating the rights and duties of an officer charged with the service of legal process in a civil proceeding. The facts were as follows: The defendant Bartlett, at the time, was deputy sheriff; a lawful writ of summons had been placed in his hands to be served on Mrs. Hull, who knowing that service was about to be made upon her, fled from town to town, and hid herself in many ways and places, resorting to extraordinary expedients and subterfuges to elude the officer. At last the defendant traced her, as he believed to the house of one Veits, where, upon inquiry, he was told that she had left in the morning. Permission to search was for a time denied, but afterwards granted; but she was not found in the house. Finally the door of a small outbuilding was discovered fastened. But no response could be obtained from any person within, after repeated calls. At last the defendant (having first obtained permission of the owner for that purpose) forced the door, and found a woman lying on the floor, with her head and face closely wrapped to prevent identification. The defendant repeatedly requested her to uncover her face in order that he might know who she was, stating his business. But after waiting long, she still kept her position and the covering over her face. He then, as gently as possible, raised her up and uncovered her face for the mere purpose of identifying her, that he might complete the service and make truthful return upon the writ.

"Under the circumstances of this case," the court proceeded to say, after stating these facts, "will the law justify an act on the part of the officer which would otherwise constitute an assault and battery? It was the

Mun. Case.]

REG. EX REL. CHOATE V. TURNER—REG. V. BAKEWELL.

[Crim. Case.]

names of the candidates. They both said they requested the Deputy Returning Officer to mark the ballot paper for them, which he did, and there was no reason to doubt that he complied strictly with their request. But the declaration mentioned in section 144, sub-sec. 3, and marked "D," was not made by either of these voters, nor was the declaration under the same section and marked "F" made by the Deputy Returning Officer. It is further said that one or two others—persons who are unknown, but who represented themselves unable to mark or to distinguish the names—put in their votes in a similar way, and without the declarations mentioned. The Deputy Returning Officer swears that he took those votes at the request of these voters, and that in each case he asked the agent of the respondent whether he was satisfied with what was done, and that his reply was in the affirmative, or at least his assent was signified. It is not shown that the result of the election was affected in any way by what the Deputy Returning Officer did, but it is suggested that it may have been affected by it. But this is purely conjectural, and not probable. By section 168 of the Municipal Act non-compliance with the rules as to the taking of the poll . . . "shall not render the election invalid . . . if such non-compliance did not affect the result of the election." In *Regina ex rel. Walker v. Mitchell*, 4 P. R. 218, the successful candidate had only a majority of one. It appears that by a mistake of the returning-officer the name of a candidate had been omitted from the list until half the day of election had expired, and it was urged, with what appears to me much plausibility, that had it not been for this omission the result might have been very different. Nevertheless, Wilson, C. J., held that it did not appear to him, from what was shown, that the result would have been other than it was had the omission not occurred, and he held the election to be valid. If mere surmise or conjecture was allowed to be enough to invalidate an election, little ingenuity would be requisite to present a plausible reason for giving force to every irregularity, and I apprehend that comparatively few of these municipal elections, in the rural districts, are free from some defect of this description. In the case before me the Deputy Returning Officer has acted in that capacity on many previous occasions, without going through the formalities mentioned, and no objection has been made. This does

not excuse his non-compliance with the Act on this occasion, but it tends to show that such omissions are not uncommon. And when the respondent was well represented by his agent, as he was at this election, and he allowed the Deputy Returning Officer to proceed as he did without any complaint, if not with his approval, I certainly must conclude that he consented to what was done. I do not think there is any sufficient reason that I should pronounce this election invalid upon any ground which the respondent has advanced.

I have, therefore, to pronounce the relator the duly elected Councillor by a valid election, which I do to the exclusion of the respondent.

As respects the question of costs, I should have felt disinclined to allow them to either party had the contest been confined to the question of the validity of the two ballot papers, because that was a matter exclusively within the cognizance of the returning-officer. But as the respondent has raised questions by which the controversy has been prolonged, and in which he has failed, I see no reason why the common rule should be departed from, which is that the unsuccessful party pay the costs, and I so direct.

COUNTY JUDGES' CRIMINAL COURT —COUNTY OF ONTARIO.

REGINA V. BAKEWELL.

Arson—Setting fire to a chattel within a dwelling house—32-33 Vict., c. 22, sec. 8.

Recklessly and wantonly, or even maliciously, setting fire to a chattel within a dwelling house, is not, under all circumstances, a felony within the meaning of the "Malicious Injury to Property Act," (32-33 Vict., c. 22, sec. 8, Dom.)

[Whitby.—DARTNELL, J.J.]

The prisoner was committed for trial by a magistrate, and was indicted under the "Malicious Injuries to Property Act," sec. 8. It appeared in evidence that the prisoner, in a fit of drunken recklessness, struck a match, and set on fire a tissue paper "flycatcher" or ornament, attached to the ceiling of a room in a tavern, in the Village of Brooklin. The fire was extinguished without much damage being done.

DARTNELL, J.J.—The section of this Act under which the prisoner was indicted reads as

RECENT ENGLISH PRACTICE CASES.

follows: "Whosoever unlawfully and maliciously sets fire to any matter or thing, being in or against any building, *under such circumstances that if the building were thereby set fire to, the offence would amount to a felony*, is guilty of felony, and shall, etc."

The prisoner's act was no doubt "unlawful," but that it was done maliciously could only be inferred from the act itself. The evidence shows it was the crazy and unthinking act of a man under the influence of liquor. Under these circumstances I do not think I can convict the prisoner. If the damages had exceeded \$20 the prisoner could have been found guilty of a misdemeanor, under section 59, and, at any rate, the magistrate could have fined him under section 60. Instead of this he has committed him for a felony, and the prisoner has thus escaped from any punishment for a wanton and reckless act, which might unhappily have been followed by loss of much property, and perhaps of life itself.

Even if the malicious design to destroy by fire a chattel within the building had been proved, it does not follow that the firing of the building itself, as the probable or immediate effect of the act, would amount to a felony. The design or intent to fire the building itself, is, I take it, the *gravamen* of the charge. I am sustained in this view by the case of *Regina v. Childs*, (L.R. 1 Cr. Ca. Reserved 307), which was a case reserved upon an indictment under a similar clause in the English Criminal Statutes. In that case, although the jury found that the chattel had been unlawfully and maliciously set on fire, the Court was of opinion that no felony had been committed. Blackburn, J., in giving his opinion says, "Mr. Greaves, in his edition of our Consolidated Acts, (p. 165), says that if you set fire to one thing, under such circumstances that you are likely thereby to set fire to another thing, then, if the setting fire to the one thing is malicious, the setting fire to the other is so too. If that is good law, then the setting fire to the house here, if it had caught fire, would be felony. But it is not law, and the framers of the Act have failed to express the meaning they intended to express."

I find the prisoner not guilty of the felony as charged.

RECENT ENGLISH PRACTICE CASES.

WOOD V. WHEATER.

Imp. R. 17, r. 2, 42, r. 3—Ont. R. 116, 341—Foreclosure—Action for recovery of land.

[L. R. 22 Ch. D.]

CHITTY, J.—A foreclosure action, although held in *Heath v. Pugh*, L. R. 6 Q. B. D. 345; 7 App. Cas. 235, to be an action for the recovery of land, is not an action for the recovery of the possession of land within the meaning of O. 42, r. 3, (Ont. R. 341). The effect of an order for foreclosure absolute is merely to bar the equity of redemption . . . Possibly, in future, it might be advantageous in every foreclosure action to add a claim for possession.

[NOTE.—As to an action for foreclosure being an action for the recovery of land, see *Barwick v. Barwick*, 21 Gr. 39.]

COMPTON V. PRESTON.

Imp. O. 17, r. 2, 19, r. 3, 22, r. 9—Ont. R. 116, 127, 168—Pleading—Recovery of land—Counter-claim.

The provision of Imp. O. 17, r. 2, (Ont. R. 116), that no cause of action, except those specified in that rule, shall, unless by leave of the Court, be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action.

[L. R. 21 Ch. D. 138.]

The defendant, by counter-claim, sought to set up two causes of action; the first, a right to recover land; the other, a right to damages for deceit. No leave had been obtained to join the two causes of action.

FRY, J., held the joinder of the two causes of action in the counter-claim was, in its nature, embarrassing, and made an order excluding the defendant from the benefit of the counter-claim.

As to Imp. O. 17, r. 2, (Ont. R. 116), he says: "It is to be observed the terms of the rule are perfectly general, and it is difficult to see why a counter-claim for the recovery of land is not an action for the recovery of land. At any rate, that which is embarrassing, if joined in a statement of claim with an action to recover land, is likely to be embarrassing if joined in a counter-claim for the recovery of land. And, further, it would be absurd to hold that that which cannot be joined with a claim to recover land can be

joined with a counter-claim for the same purpose, for then the mere fact that a plaintiff claims a trivial amount of damages would release the defendant from the fetter of the rule, and enable him, without the leave of the Court, to join any cause of action with a counter-claim to recover land. Then it is important to enquire what are the principles on which the rules relating to actions for the recovery of land are founded. They are explained by JESSEL, M.R., in *Gledhill v. Hunter*, L. R. 14 Ch. D. 492. All these rules appear to me to apply equally whether the claim to recover land is raised in an original action or by a counter-claim.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS DIVISION.

FIRE INSURANCE ASSOCIATION ET AL. V. CANADA FIRE AND MARINE INSURANCE CO.

Re-insurance—Statutory conditions.

The Dominion Insurance Company insured one C. for \$2,500, and re-insured \$1,000 with defendants. Subsequently, an agreement was entered into between the Dominion Company and the Fire Insurance Association, which, after reciting the Company's determination to discontinue business, and their desire to be released from and guaranteed against loss on their existing risks, and their agreement to transfer all their existing business to the Association, and the agreement of the Association to relieve the Company, and to accept a transfer of their business and reinsure their risks, the Association agreed to and did thereby reinsure all the Company's existing risks, and bound and obliged themselves to pay and indemnify the Company against all losses on policies, and the expenses of adjusting same. The agreement provided that the Association should take and accept all insurances which the Company might have effected with any other company, with all and every the powers and rights of the Company. The good will of the Company was then assigned to the Association, and the Company were not to engage in business for five years. After the agreement had been entered into, a fire occurred by

which C. sustained loss to the amount insured, which was paid by the Association, and this action was then brought to recover the re-insurance of \$1,000 from the defendants.

Held, that the Association was entitled to recover such amount from the defendants for treating the agreement as a re-insurance, though more properly described as a transfer of the business, with its liabilities and collateral securities, if it was of the whole amount of the Company's liability, the Association having paid the whole loss to the Company, or what was the same thing, to C., were entitled, irrespective of any assignment, to contribution from defendants to the extent of the amount re-insured by them. If, however, it was only of the residue of C.'s risk, the defendants were still liable to the Company on their policy, and by the very terms of the agreement, it was effectually assigned to the Association, who acquired all their co-plaintiff's rights and interests in it.

Held, also, that the Fire Insurance Policy Act does not apply to a contract or policy of re-insurance so as to make it subject to the statutory conditions.

Robinson, Q.C., and *George Harman*, for the plaintiffs.

Osler, Q.C., for the defendants.

MCDONALD V. MURRAY.

Sale of land—Agreement—Uncertainty—Action to recover instalment—Necessity of tender of conveyance—Title.

By an agreement in writing for the sale of land for the price of \$60,000, \$4,000 was to be paid on the execution of the agreement, \$40,795 within 60 days thereafter; and the balance to remain on mortgage. The purchasers paid the \$4,000, but on the expiration of the 60 days, refused to pay the \$40,795, to recover which this action was brought.

Held, that the provision as to the mortgage did not render the agreement void for uncertainty, for it was a matter to be settled by the election of the purchaser.

Held, also, that an action was maintainable to recover the \$40,795, before a conveyance of the land was made; that it was the purchaser's duty to prepare and tender the conveyance for execution; that it was not necessary for the plaintiff to aver he had a good title; all he is required

to do is to make a good title when he can be called upon to do so; and he could not be so called upon until the last instalment was demanded, or the defendant showed a readiness or willingness to arrange that according to the terms of the contract.

A nonsuit entered at the trial was set aside, and a new trial granted to enable a plea of fraud to be tried.

J. K. Kerr, Q.C., and *C. J. Holman*, for the plaintiff.

McMichael, Q.C., for the defendants.

CORPORATION OF DUNDAS V. GILMOUR ET AL.
Action—Trial of questions between co-defendants—Delaying plaintiff—O. J. Act, Rule 112.

Held, under Rule 112 of the O. J. Act, where in an action the plaintiff is held entitled to recover against the defendant against whom the action is brought; the defendant is precluded from trying questions arising between himself and a co-defendant, added at his instigation, under Rule 108, in the trial of which the plaintiff has no interest, and which has the effect of delaying the plaintiff in his recovery.

Martin, Q.C., for the plaintiff.

Victor Robertson, for the defendant.

MCCANN V. CHISHOLM.

Lateral support to land—Action by tenant—Right to maintain.

Held, that an action against the proprietor of land for damage sustained to a building on the adjoining land by reason of the lateral support having been removed, may be maintained by the tenant of the land.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

DUFF V. CANADIAN MUTUAL FIRE INSURANCE COMPANY.

Mutual Insurance Companies—Solicitor's costs—Separate branches.

Action to recover the sum of \$3,343 for solicitors' costs from a Mutual Insurance Company.

Held [OSLER, J., dissenting], that under the Mutual Act (R.S.O. ch. 161), the plaintiff's remedy must be directed against the respective

branches for which the services were, in fact, rendered; and in case of a deficiency of assets of any of the branches, the members of the other branches are not liable for the claims of the defaulting or insolvent branches.

Per OSLER, J.—A creditor of the Company, as is the case of the plaintiff, for a debt incurred as part of the necessary expenses of the Company, though in relation to the business of some branches only, is entitled to be paid out of the Company's moneys derived from assessments for losses and expenses on policy holders in other branches.

Duff, for the plaintiff.

Laidlaw (of Hamilton), for the Hydrant Branch.

Osler, Q. C., for the County Branch.

REGINA V. GOODMAN.

Criminal law—Prisoners committed on one charge and tried on another—Consent.

The prisoners were committed for trial on a charge of gambling on a railway train by playing a game called "three card monte." On the case coming before the County Judge, an indictment was preferred under 42 Vict. ch. 43, sec. 3, for obtaining money by false pretences. The prisoners' counsel objected to their being tried on a different charge from that on which they were committed. The Judge overruled the objection, and on the charge being read over to the prisoners, and it being explained to them that they had the option of either being tried forthwith, or remaining untried until the next sittings of the Oyer and Terminer and General Jail Delivery, they pleaded not guilty, and said they were ready for trial. The case then proceeded, and the prisoners' counsel cross-examined some of the crown witnesses, and at the close of the case took several objections to the proceedings, but made no objection to the case having been tried without the prisoners' consent. A writ of Habeas Corpus having been issued, and the discharge of the prisoners moved for,

Held, that the motion be refused.

Per WILSON, C.J.—It is unnecessary to decide whether the prisoners' remedy was by Habeas Corpus or Writ of Error, because upon the facts they were not entitled to take either of their remedies.

Per OSLER, J.—The prisoners having been imprisoned under the conviction of a Court of

Record, an objection of error in the proceedings must be by Writ of Error; that the Writ of Habeas Corpus was, therefore, imprudently issued, and should be quashed.

T. S. Jarvis, for the prisoners.

Delamere, for the Crown.

HILLOCK V. SUTTON.

Lease by person having title by possession to original owner—Effect of—Fraud in obtaining lease—Setting aside.

In 1867, the plaintiff purchased the land in question from N. who was in possession under a bond from P., the owner, which was registered, to convey the land on payment of the purchase money. The plaintiff entered into possession, and notified P. of his purchase, and P. gave a like bond to the plaintiff. The plaintiff at the time paid P. a portion of the purchase money, but made no further payments, and did nothing thereafter to acknowledge P.'s title, remaining in possession until 1880, thereby acquiring a title by possession. The defendant, who had purchased the interest of P.'s heirs in the land, and his solicitors who were aware of the existence of the bonds, and of plaintiff's possession, by representing to the plaintiff, who was an illiterate man, and ignorant of the effect of his possession, and who had no independent legal advice, that he had no title, persuaded the plaintiff to accept a lease from the defendant in the statutory form, for two years, at a nominal rent, containing the covenant to give up possession at the end of the term.

Held, that under the circumstances, the lease must be set aside; but even if allowed to stand, it would not constitute an acknowledgement of the defendant's title under the statute, so as to displace the plaintiff's title, for its effect would only be to estop the plaintiff from denying the plaintiff's title during its continuance.

Meyer (of Orangeville), for the plaintiff.

Osler, Q.C., for the defendant.

EMERSON V. NIAGARA NAVIGATION COMPANY.

Assault by purser—Liability of defendants—Summary conviction—Bar to civil remedy.

The plaintiff, who had purchased a special excursion ticket from Toronto to Niagara and return, by the Steamer *Chicora*, good only for the

day of its date, and which had been taken up by the purser on that day, claimed the right to return by it on the following day, under an alleged agreement to that effect with the purser, which the purser denied. On the purser demanding the plaintiff's fare, and the plaintiff refusing to pay anything, the porter of the steamer, by the purser's direction, seized hold of and attempted to take as a lien for the fare, a valise which the plaintiff had in his hand, whereupon a scuffle ensued, and the plaintiff was injured.

Held [OSLER, J., dissenting], that the purser was not acting in the discharge of his duty in thus forcibly attempting to take possession of the valise out of the plaintiff's possession, and that, therefore, the defendants, the owners of the vessel, were not liable for his unauthorized act.

It appeared, also, that the purser had been summoned by the plaintiff for the assault before the Police Magistrate at Toronto, and convicted, and a fine imposed on him which he paid.

Per WILSON, C.J.—The imposition and payment of the fine for the assault, was a bar to any further proceedings, civil or criminal, for the same cause.

J. K. Kerr, Q.C., and *W. Roaf*, for the plaintiff.

D'Arcy Boulton, Q.C., for the defendants.

CUMMINGS V. LOW.

Reference—C. L. P. Act, sec. 189—Appeal.

An action for an account and delivery up of a trust estate, entered for trial at the Picton Assizes, was referred by the Judge at the Assizes, under an order, which was stated to be drawn up on reading the pleadings and hearing counsel, to the certificate of S. S. Lazier, Master of the Chancery Division at Picton, with all the powers of the Judge of the High Court as to certifying and amending pleadings, etc., and to enquire and report as to the plaintiff's right to bring the action; the defendant to have the right to claim all such fees and reasonable allowances for his care, pains and trouble, which in the Master's opinion he should show himself entitled to. The costs to be in the Master's discretion, and the whole report to be reviewed or appealed from according to the statute in that behalf.

Held, (by OSLER, J.)—A reference under sec. 189 of the C. L. P. Act, and that an appeal from

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NOTES OF CANADIAN CASES.

[Prac. Cases.]

the finding of the Master was, therefore, regularly set down under the provisions of that Act, to be heard before a single Judge in Court.

The form of the order of reference observed upon, and the ordinary and well-known terms of reference, recommended to be followed.

McKee, for the plaintiffs.

Watson, for the defendant.

CHANCERY DIVISION.

Boyd, C.]

[March 14.]

BOYS' HOME v. LEWIS.

Will Gift to trustees as a class—Construction—Compensation to executors—Interest on balance retained by executors.

Appeal from Master's report. Residuary gift to trustees in trust "to divide and pay the same to and among my legatees hereinafter named and my said trustees, or the survivor of them, in even and equal shares and proportions."

Held, the trustees took as a class, *i. e.*, one share, equal to the shares taken respectively by the legatees, for looking at the whole will it appeared the testator was speaking of the trustees in their official capacity, and regarding them as one legal person.

It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will.

Where there is a bequest of a share of the residuary estate to executors it is not to be inferred that the bequest was given in lieu of compensation, as in the case of a legacy of a definite sum, but it is nevertheless one of the elements to be considered in dealing with the question of compensation.

Held, in this case, the executors were entitled to compensation, notwithstanding a bequest to them of a share of the residue, because the amount of the residue was, when the will was made and after the testator's death, a matter of extreme uncertainty.

By the usual course of the Court interest is not chargeable against an executor till after the end of the first year *prima facie* the fund is then distributed, and if he keeps money thereafter in his hands without reason he will be charged with interest.

Held, in this case, there was no good reason for not charging the executors with interest upon the residue in their hands after the time when

it was distributable. The usual rate of interest should be charged upon it from the time it might properly have been distributed or appropriated down to the time of its actual payment, or, if not yet paid, down to the present time.

S. H. Blake, Q.C., for the trustees.

E. Martin, Q.C., for defendant Rachel Evans.

J. M. Gibson, for the plaintiff.

Boyd, C.]

[March 14.]

SCANE V. DUCKETT.

Demurrer—Creditor's action—Bills of costs—R. S. O. c. 140, s. 32.

In an action to set aside a conveyance of land as an undue preference, and fraudulent and void under 13 Eliz. c. 5, and 27 Eliz. c. 4, the averment that the plaintiff sues on behalf of all other creditors is a mere formality, and not ground for demurrer. The objection that there is no such averment is, at the highest, one savouring of non-joinder, and is to be dealt with under Rules 103, 104.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, pursuant to R. S. O. c. 140, s. 32, is not now, any more than before the Judicature Act, ground for demurrer, but if the defendant wishes to take the objection he must allege it as a ground of defence. Though under R. S. O. c. 140, s. 32, the right of action on a bill of costs may be suspended pending a month from delivery, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void.

Wilson, for the demurrer.

Hoyle, contra.

PRACTICE CASES.

Proudfoot, J.]

[Feb. 2.]

RYAN v. FISH

Dower and damages for detention—Judgment of seisin—Mistake of solicitor—Discretion of Master—R. S. O. ch. 55, sect. 20.

In an action for dower and damages for detention of dower defendants appeared under

Prac. Cases.]

NOTES OF CANADIAN CASES—BOOKS RECEIVED.

R. S. O. Cap. 55, sect. 20, filed acknowledgment of tenancy, consent to dower, etc. Plaintiff's solicitor thereupon entered judgment of *seisin*, issued writ of assignment of dower, and proceeded for damages. The judgment of *seisin* was held, at the hearing, to be final and conclusive, but leave was given to plaintiff to move in Chambers to vacate it.

The Master in Chambers made an order vacating the judgment.

Held, on appeal, affirming the Master's decision that the order was one, in the discretion of the Master, which was properly exercised under the circumstances in the plaintiff's favour, especially as judgment had been signed through mistake of her solicitor.

Hoyles, for the plaintiff.

J. D. King, (Berlin), for the defendant.

Mr. Dalton, Q.C.]

[March 9.

WILSON V. COWAN.

Examination—Notice—Subpoena—O.J.A. sec. 52.

The practice which prevailed in the former Court of Chancery with respect to examinations for discovery is continued by the O. J. A. sec. 52, and applies in the Chancery Division. Forty-eight hours notice of the examination is therefore not necessary to be given to a party to be examined, but only to the opposite solicitor. The party is only entitled to reasonable notice.

A subpoena dated prior to the issue of the appointment for examination is regular provided it was issued after the time when the party examining was entitled to examine.

Langton for the plaintiff.

H. Cassels, contra.

Boyd, C.]

[March 20.

BRECKENRIDGE V. ONTARIO LOAN AND DEPOSIT CO.

Minutes of judgment, settlement of—Rule 416.

S. H. Blake, Q.C., for plaintiff, moved to vary the minutes of a judgment which had been settled by a local Registrar.

Hoyles, for defendant, opposed the motion.

The CHANCELLOR:—I am of opinion that the minutes should be varied as asked, but I think where the parties cannot agree to the terms of the minutes of a judgment before a Local Registrar, a direction should be obtained from the

Judge to refer the matter to one of the Judgment Clerks under Rule 416, and as that course had not been pursued in this case the minutes must be varied, but I cannot make any order as to the costs except that they be costs in the cause.

BOOKS RECEIVED.

We acknowledge, with thanks, the following:—

PRINCIPLES OF THE COMMON LAW. By John Indermaur. 3rd edition. Stevens & Haynes, London, 1883.

EMPLOYERS' LIABILITY FOR PERSONAL INJURIES TO THEIR EMPLOYEES. By Charles G. Fall, Boston, U. S., 1883.

INDEX TO DOMINION ACTS AND IMPERIAL ACTS, Treaties and Orders in Council affecting Canada, printed with the Canadian Statutes. By F. B. Hayes and R. J. Wicksteed, Ottawa, 1882.

CLASSIFIED TABLE OF THE PUBLIC GENERAL STATUTES OF CANADA wholly or partly in force at the end of the Session of 1882, with remarks. By G. W. Wicksteed, Esq., Q. C., Law Clerk, House of Commons.

FLOTSAM AND JETSAM.

A recent number of the *London Law Journal* contains the following:—"The practice of experimenting before judges is likely to receive a check, if it is often followed by such results as happened in a case before Mr. Justice Pearson last week. Two German firms were disputing the exclusive right in certain patents for improvements 'in the production of coloring matters suitable for dyeing and printing.' The contention of the defendants was that the chemical means described in the specification were impossible because if the 'oxyazo-naphthalinoine' were to be united with the 'fuming sulphuric acid' of the strength therein described, it would be dangerous to human life; and an experiment *coram judice* was proposed. In an unguarded moment the judge consented, and adjourned into an empty room, where the baleful mixture was concocted by adding a teaspoonful of the unpronounceable liquid to an ounce of fuming sulphuric acid. The result was terrific. 'So dense and poisonous' were the effects of the fumes which arose, the judge, counsel, witnesses and bystanders fled,' with the utmost precipitancy, to avoid being asphyxiated on the spot."

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DIARY FOR APRIL.

15. Sun.... *Third Sunday after Easter.*
22. Sun.... *Fourth Sunday after Easter.*
23. Mon... *St. George's Day.*
24. Tues... *Earl Cathcart, Gov.-General, 1840.*
25. Wed... *Spragge, C., appointed Chief-Justice of Ont., 1881.*
29. Sun.... *Rogation Sunday.*

TORONTO, APRIL 15, 1883.

THE vacancy on the County Court Bench caused by the death of Judge Mackenzie has been filled by the promotion of the junior Judge, John Boyd, Esquire, to one of the most important judicial positions in the province. His place has been filled by the appointment of Joseph Easton McDougall. The appointment is an excellent one. Mr. McDougall has frequently been called upon to preside in the Division Court on emergencies, and has already shown his capacity in that position. We echo the sentiments expressed in the following address presented to the new Judge on the 10th inst., at a large meeting of the Bar:—

"The Bar of Toronto desire to avail themselves of the occasion of your appointment as Junior Judge of the metropolitan county of York, and local judge of the High Court of Justice for Ontario, to congratulate you upon the honour which they think has been so deservedly conferred. In addition to our expression of satisfaction at your appointment, we must be allowed to congratulate also the members of the profession, and the suitors in the Court, that the choice of Her Majesty's advisers has fallen upon one so eminently qualified in every way to discharge the responsible and arduous duties of this high office.

We feel quite sure that the ability, energy and industry which have enabled you to win the position you have held at the Bar will also dignify the Bench, and we earnestly hope that as

you have been called to this honour in the prime of your life, you may be spared for many years to enjoy the position you have so well deserved. Signed on behalf of the Bar,

CHARLES MOSS."

Mr. McDougall was called to the Bar in Easter Term, 1870.

ONE scarcely hopes to find in a Blue Book a literary treasure, and it could hardly have been anticipated that a glance at one recently received, would have been rewarded by the discovery of the gem which we take the liberty of reproducing, albeit it is not altogether in the line of a legal journal; however, it may be a sufficient excuse that it appears in the Report of the Minister of Justice as to Penitentiaries. The Dorchester Penitentiary, like other institutions of a similar character, boasts of a Protestant and of a Roman Catholic chaplain. First is given the report of the former, in which he alludes to the spiritual work devolving upon him. This is followed by the report of his coadjutor of the other faith, who thus alludes to an event which evidently filled him with some surprise:—

"A fact worth mentioning was the transit of one convict from the Catholic to the Protestant faith. Exactly one week after having been prepared for death, and received the last rites of the Roman Catholic Church, he made a declaration to the warden that he wanted to be a Protestant. His application was sent to Ottawa, and his request was granted. The reason of this change, in my opinion, was heart disease caused by epileptic fits."

It is gratifying to know that the request of the poor convict, to be allowed to make a "transit" from one faith to another, was granted by the authorities at Ottawa. Such an exhibition of impartiality must forever put

EDITORIAL ITEMS.

to silence those who would insinuate that the influence of the Roman Catholic hierarchy in that quarter is used to the prejudice of the Protestant faith. The last sentence makes one think of the charitable simplicity of the good old bishop in *Les Misérables*, or a keen ally of Sydney Smith.

An able cotemporary in the United States come down in this sledge hammer fashion on the Appellate Courts of that country :

"Can nothing be done to shorten the opinions delivered by our appellate courts? Do our judges realize that every superfluous sentence, every verbose expression, is a tax upon the time and patience of a thousand busy lawyers, not to speak of the useless increase of expense required to embalm the results of such lucubrations in the immortality of printer's ink and paper? It is a tax not like other taxes levied and paid once for all, but an ever recurring burden? What is the real secret reason for these endless, rambling discussions of inconsequential trifles, when the pith and marrow of the controversy might be disposed of in a few pointed sentences? The legitimate fields of the jurist and the legal essayist are, and should be kept separate and distinct. Is it that our judges are, after all, only half educated in the principles of legal science, or is it that they are actuated by a paltry, selfish vanity, which forgets the interest of the public and of their brethren at the bar in the gratification of an idle dream of judicial eminence? Or can it be (as we have heard it whispered), that this waste of time and ink is, after all, but a sort of pandering on the part of the judges to the supposed expectations of the lawyers engaged in the cause that it should be "exhaustively considered" by the court, *i.e.*, that every idle doubt, or question as to perfectly well established principles of law, which the racked imagination of the brief maker can suggest, shall be resolved and minutely discussed by the court.

Whatever may be the secret of this practice, it cannot be otherwise than discreditable to the bench, whether it proceeds from mental confusion, indolence, vanity, or a demagogical desire to stand well with influential members of the profession. That it is wholly unnecessary, is

evidenced by the fact that the best considered and most quoted opinions, not only in the past, but even in certain rare instances of to-day, are briefly and tersely expressed. Of course there are cases which call for a full elaboration, but they are exceedingly rare, as will be found from an examination of the decisions of great jurists like Mansfield, Story, Marshall and Kent, and in later days, Cooley, Gray, and Chief Justice Waite. We believe that as to the State Supreme Courts, the rule will be found to hold good that the best courts, and those most quoted and respected beyond their own State's limits, are those in which the opinions are shortest on an average. It seems to us that, while nobody can assume to dictate to the judges, still, inasmuch as they are not, and in the nature of things can not be, above legitimate and respectful criticism, it would be both proper and advisable for the respective State bar association, in those States where the grievance exists, to discuss the matter with a view of calling the attention of their courts, in a proper and respectful manner, to the necessity of a reform in that direction."

These criticisms are not apparently aimed at the United States Supreme Court, but at the Appellate Courts in the different States. Another cotemporary alluding to the "mental confusion," etc., spoken of above, comes to the rescue in these words :—

"Thoughtful lawyers know this imputation has no warrant outside the mental confusion of him who wrote it. Our appellate judges, State and Federal, are almost all of them overworked. *The have no time to be brief.* To prepare a closely reasoned, clear, compact opinion requires time for rewriting, recasting and pruning down the first rough draft which embodies the conclusions of the court. From Horace till to-day writers and scholars have recognized this truth. The greatest blunderer who ever sat on the Supreme Bench of Missouri, boasted, they say, that he could 'write two opinions before breakfast.' They were certainly short and usually wrong. Ignorant judges tend to verbosity; but what appellate judges most need is relief from the enormous pressure under which they work: then they will have time to be brief, clear and pointed, without omitting the limitations and qualifications of statement so necessary for accuracy. Then their decisions will not only be

VENDOR AND PURCHASER—INSURANCE.—RECENT ENGLISH DECISIONS

oftener true to correct principles, but will convince readers of their propriety and soundness of doctrine."

VENDOR AND PURCHASER— INSURANCE.

Castellain v. Preston, 8 Q. B. D. 613, 46 L. T. 569, we see, has been reversed by the English Court of Appeal. The case arose out of *Rayner v. Preston*, 18 Ch. D. 1, 44 L. T. 787, where it was held that a vendee was not entitled to the benefit of an insurance effected by the vendor on the property sold, where the buildings thereon had been destroyed by fire between the making of the contract and the time fixed for completion—the insurance company having in that case paid the insurance money to the vendor in ignorance of the contract of sale. It was, however, suggested by the Court of Appeal in that case, that the insurance company might recover the money from the vendor; and in pursuance of that suggestion the action of *Castellain v. Preston* appears to have been brought. The action was dismissed by Chitty J., but his decision has now been reversed, on the ground that the contract of fire insurance is strictly one of indemnity. The result of the two decisions would appear to point to the conclusion that the contract of sale on payment of the consideration, puts an end to an insurance effected by a vendor—for *Rayner v. Preston* decides that the vendee is not entitled to the benefit of it, and *Castellain v. Preston* now establishes that the vendor is not entitled either. In order that a purchaser may get the benefit of insurance existing on the purchased property at the time of sale, he must obtain an actual transfer thereof. Failing that, the property is at his risk, and he must insure for himself.

In sales by the Court it has been held that the risk of loss by fire does not devolve on the purchaser until the report on sale is con-

firmed. In other words, losses by fire occurring before the confirmation of the report, must be borne by the vendor: (*Stephenson v. Bain*, 8 P. R. 258). In such cases, however, it would seem from the decision in *Castellain v. Preston* that the vendor's right under existing insurances would not be affected until after the confirmation of the report on sale, and possibly not until payment of the consideration.

In *Russell v. Robertson*, 1 Chy. Ch. R. 72, and *White v. Brown*, 2 Cush. 412, it was held that a mortgagee insuring the mortgaged property with his own funds and not charging the premiums to the mortgagor, and not so insuring in pursuance of any covenant in that behalf in the mortgage, in the event of loss is not bound as against the mortgagor to credit the insurance moneys received by him in reduction of the mortgage debt. *Castellain v. Preston*, however, would seem to indicate that if the mortgagee recover his mortgage debt from the mortgagor, the insurer would not be bound to pay the insurance, or would be entitled to reclaim it if it had been paid.

RECENT ENGLISH DECISIONS.

The March numbers of the *Law Reports* consist of 10 Q. B. D. 161-241, and 22 Ch. D. 283-483.

In the first of these, the first case, *Bolckow & Co. v. Fisher*, is one on the subject of discovery, and the principle illustrated by it may be pointed out by quoting the following passage from the judgment of Lindley, L. J.: "It seems to me that where a party is interrogated as to matters done, or omitted to be done, by his agents and servants in the course of their employment, he does not sufficiently answer, by saying that he does not know, and that he has no information on the subject. He is bound to go further, and obtain information from such agents or servants of his,

RECENT ENGLISH DECISIONS.

or he must show some sufficient reason for not doing so." He also adds: "I do not see that there is any difference in principle between setting out the facts in an affidavit of documents, and in answering interrogatories." To this passage from Lindley, L. J., may be added the qualifying remarks of Brett, L. J.:—"I think, however, a party would not be bound to answer as to that which was only known to his servants or agents accidentally and not in the ordinary course of business. And although the acts might be such as would be known to his servants or agents in the ordinary course of business, I think he would sufficiently answer by saying that whether such acts were or were not done was not personally known to himself, and that the person who was the servant or agent at the time at which they were supposed to have been done was no longer his servant or agent, or under his control, or in such a position that it would not be reasonable to force him to communicate with him."

CONTRACT—INCORPORATION OF CONDITIONS—PRESUMED ASSENT.

The next case requiring notice is *Watkins v. Rymill*, p. 178, which contains an elaborate judgment by Stephen, J., on the above subject. The plaintiff had deposited a carriage with the defendant for sale on commission, and thereupon received a receipt for the same, which purported to be "subject to the conditions as exhibited on the premises." The plaintiff swore he did not read the receipt, but put it in his pocket without noticing it, and the question was whether he was, nevertheless, bound by the conditions exhibited on the premises. The authorities are reviewed at great length, and in conclusion, the principles to be deduced from them are tabulated in the usual manner of the learned judge. He says, p. 188:—"Thrown into a general form, the result of the authorities considered, appears to be as follows. A great number of contracts are, in the present state of society, made by delivery by one of the contracting parties to the other of a document in a com-

mon form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule, however, there are a variety of exceptions:—(i) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special terms. . . . (ii) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document. (iii) A third exception occurs, if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470. (iv) An exception has been suggested of conditions unreasonable in themselves, or irrelevant to the main purpose of the contract." And proceeding to apply these principles to the case before him, he arrives at the conclusion that it comes under none of those exceptions, but under the general rule. It may be worth while also to call attention to the proposition of Stephen, J., at p. 190, that "a question of fact, to which, by law, one answer only can be given, is the same thing as a question of law."

COSTS—DUTY OF SOLICITOR IN INFORMING CLIENT.

Passing by a case of *Attorney-General v. Emerson*, which will be found noted among our Recent English Practice Cases, we reach *In Re Blyth v. Fanshawe*, p. 207, and the principle which that case illustrates is thus stated by Baggallay, L. J.:—"I take it to be the general rule of law, and an important rule which is to be observed in almost all cases—

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that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial."

This concludes the cases requiring notice in the March number of the Q. B. D.

FORECLOSURE OF EQUITABLE MORTGAGES.

In the March number of the Chancery Division, 22 Ch. D. 283-483, the first case, *Lees v. Fisher*, p. 283, relates to the form of decree for foreclosure of an equitable mortgage. The L. C., in whose judgment the other Judges of Appeal concurred, says:—"We think that in the future foreclosure decrees in cases of equitable mortgages ought to contain the word 'foreclose.' They ought to contain directions that upon default of payment by the specified time the mortgagor will be foreclosed, that the mortgaged hereditaments will be discharged from all equity of redemption, and that a conveyance from the mortgagor to the mortgagee must be executed.

TRUST FOR SALE—PARTITION.

In *Biggs v. Peacock*, p. 284, a testator directed the trustees of his will, at such times and in such manner as they should think fit, to sell his copyhold estate, and to hold the proceeds in trust for his wife for life, and after his death for his children. All the children were of full age, and had attained vested interests, and the question was, whether the Court had jurisdiction under the Partition Act to direct a partition against the will of some of the children. The Court of Appeal held it had not, for the will contained a trust for sale; it was not like a power given by a will. The M. R. said:—"Any one of the *cestuis que trust* has a right to insist on the trust being carried out. It is a mistake to say that it is like a power given by a will. In

such a case the property in the estate is in the devisee. But here the estate is converted into personalty, and the *cestuis que trust* are only entitled to shares of the proceeds. Although, no doubt, if all are of age and *sui juris*, they could call upon the trustee to convey the estate to them; yet none of them has a right, in opposition to the others, to insist upon partition being made of it, which would be dealing with it as if it were real estate."

RIGHT TO INSIST ON EVIDENCE BEING HEARD—
APPELLATE COURT.

The next case requiring notice is *Ex parte Jacobson, in re Pangoffs*, p. 312, is authority on the following point, viz., that if a judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given; if, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be taken before reversing the decision.

STAYING PROCEEDINGS—TWO ACTIONS IN DIFFERENT
COUNTRIES.

Passing by three cases which do not appear to have any application in this country, the next case to be noticed is *McHenry v. Lewis*, p. 397. This case is an authority on a point which arose among others in the recent case of *Hughes v. Rees*, before Ferguson, J., noted *supra*, p. 113. In *Hughes v. Rees*, it is laid down that the fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same purpose in this country. In *McHenry v. Lewis* the question was whether or not when an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this Court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by

RECENT ENGLISH DECISIONS—SIR GEORGE JESSEL.

reason of the action being brought also in the foreign country. The Court of Appeal decided that the Court had jurisdiction, but at the same time there was no presumption that the multiplicity of actions was vexatious, and a special case must be made out to induce the Court to interfere. The late Master of the Rolls says, p. 400:—"It appears to me that very different considerations arise when both actions are brought in this country, and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. . . . The same principle applies, it appears to me, wherever the judgment can be enforced, and for that reason I think the case of *Lord Dillon v. Alvares*, 4 Ves. 357, can no longer be relied on.

It is possible that the same observation might be made as regards the Queen's Courts in any other part of the world, but that of course may be subject to exception as regards the nature of the remedy. But where it is in a foreign country, it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different. Take the case of an Englishman suing abroad a foreigner resident abroad, and the foreigner coming to this country, as in *Cox v. Mitchell*, 7 Q. B. (N.S.) 55, the plaintiff might have totally different remedies.

. . . He might have a personal remedy in one country, and a remedy only against the goods in another. . . . It is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country, as well as in this country, is vexatious. It seems to me you must make out a special case, and there is, therefore, that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court, and the other in the Court of a foreign sovereign." According to *Hughes v. Rees*, although the Provinces

of Quebec and Ontario are both in the Queen's Dominions, the pendency of the one action cannot be pleaded in bar of the other. Yet this would seem in accordance with the principles of the law as above enunciated, by reason of the different remedies a plaintiff might have in the one, as compared with those he might have in the other. It would seem, too, from *McHenry v. Lewis*, that in the case of a suit for the same matter pending in a foreign country, the Court would be more willing to interfere, under its general jurisdiction, to restrain vexatious and oppressive legislation, after a decree has been made in one of the actions, than before."

WRIT OF EJECTMENT—RE-ENTRY OF LANDLORD.

The next case, *Ex parte Sir W. Hart Dyke*, p. 410, is mainly concerned with points of bankruptcy law, and therefore does not require notice further than to say that in it the question is raised whether, since the Imp. Common Law Procedure Act of 1852, and the Judicature Acts, the issuing of a writ of ejectment, at all events after the appearance of the defendant, is equivalent to re-entry by the landlord. A decision on this point was not, however, necessary to the case, and there the Court refused to deal with it.

A. H. F. I.

SELECTIONS.

SIR GEORGE JESSEL.

The death of the Master of the Rolls will be received throughout the country, and particularly in the legal profession, as a national loss. The public were beginning to obtain a true estimate of Sir George Jessel's powers; but lawyers alone fully knew his greatness; The popular appreciation of judges is generally built up of facts which but little influence the lawyer. If the judge has been in Parliament, a reflex of his Parliamentary reputation follows him to the bench; but Sir George Jessel's Parliamentary career did not lay the foundation of a reputation. His genius was too purely intellectual, and contemptuous of

SIR GEORGE JESSEL.

weaker minds, to commend itself to the average member of the House of Commons; and he was persuasive by the force of his reasoning only. This, however, is the power which makes a reputation among lawyers. The strength of his intellectual qualities was the more conspicuous because its recognition was conceded, in spite of many faults of manner. There are many whose memory of Sir George Jessel will be accompanied by some soreness. He did not spare any one who crossed swords with him in argument, whether his opponent was at the bar or on the bench. But his manner was due to no feeling but the desire to push home his conclusion. It was well known at the bar, that if a man had something to say worth hearing, and said it in a few words, Jessel would be sure to listen to him, particularly if he were a young man. He would take pains to show the disputant the error of his ways, and he never passed unnoticed any objection to his decision which had any weight whatever. Sir George Jessel never wrote a judgment while he was on the bench, and yet he seldom delivered one which did not deal with every point in the case; and sometimes, when he had clearly made up his mind as to some obscure legal topic or disputed Act of Parliament, he went out of his way to elucidate it. Within the last few days the Master of the Rolls seems to have been conscious of the defect in his judicial manner. "Don't think I am against you," he said; "counsel, in arguing, sometimes think that I am much more against them than I really am"—a confession which has now something pathetic in it.

The performance by Sir George Jessel of his daily work in the now deserted Rolls Court was an exhibition of power seldom witnessed. The lawyer hardly knew which most to admire—his minute knowledge of case-law, the breadth of his acquaintance with legal principles, or the amazing rapidity with which he took in the facts of his cases. Sir George Jessel seemed to devour an affidavit as soon as it was put into his hand. There was a superstition that nature had physically endowed him above other men with the capacity of acquiring knowledge, and that he could read one line with one eye and the next line with the other. It is certain that hardly any subject came to the surface in his Court without his displaying a knowledge of it which astonished experts. Large drafts were made on these gifts in patent cases, and the Master of the Rolls was

equally at home in mechanical complications and in chemical mysteries. Something has necessarily been said of his fault of manner on the bench; but it lay merely in the manner. His mind was eminently judicial, and the most skilful advocate that practised before him probably never discovered that he had any prejudices. Least of all had he any favour for those of his own race, although he was the first of his blood who attained the English bench. On one occasion, when it appeared that a peculiarly hard bargain had been driven by a party in the case, the Master of the Rolls observed: "I fear this gentleman is of the Israelitish race." There was no section of the community which did not look to him for the most uncompromising justice. This was due to the belief, not only that he had a practical knowledge of most of the affairs of life, and was a learned lawyer, but that his mind was absolutely free from cant. His rapidity was so great, and his reputation so high, that the Rolls Court became during his reign the most important Court in the country. When the Judicature Acts came into operation, the universality of Sir George Jessel's legal knowledge stood him in good stead. Here, at least, was one judge who could decide off-hand upon the limitations of a crabbed settlement at one moment, and at another expound the obscurities of a bill of lading. Sir George Jessel's place in history will probably be connected with these Acts. The Common Law Procedure Acts failed to bring about a satisfactory compromise between law and equity. As Sir George Jessel was fond of pointing out, the common law judges had equitable powers given to them by those Acts which the Chancery judges did not possess. These powers, however, were ignored, and the Judicature Acts became necessary. The same influences were at work in the passing of the Judicature Acts, and at an early date they showed themselves ominously. Sir George Jessel set himself to the task of giving the most liberal operation to the principles of those Acts, and he effected far more for the fusion of law and equity than the Acts themselves. It is not too much to say that the success which the Judicature Acts have obtained would have been impossible without him.

Sir George Jessel was not free from the faults to which great minds like his are liable. He was so quick that occasionally he was hasty, but the mistakes he made were not half so many as those of other judges who

FILTHY PERCOLATIONS.

ally find I am right." His ready wit sometimes extricated him in an unexpected way from the mazes of subtlety which were sometimes thrown around questions at the bar. Thus he was sitting in banco, with Baron Bramwell by his side, in the little room up many stairs, known as the second Vice-Chancellor's Court at Westminster, now happily among the courts abandoned, while a long-winded counsel was "distinguishing" the case before them from a decision of the House of Lords. After painfully enduring the operation for some time, the baron said: "You are very much mistaken, if you think that my brother Bramwell and I, sitting in this cock-loft, are going to overrule the House of Lords." His sentences on malefactors, like his judgments, were short: "You are a bad old man, and you'll just take ten years' penal servitude," was quite enough for the confirmed sinner convicted for the tenth time of felony. In a prolix age his brevity was refreshing; and if his mode of cutting knots instead of untying them prevented his elucidating the law, it at least tended to the despatch of business. In his total absence of affectation, sometimes approaching a want of dignity, he was free from another of the smaller vices of the day. On a summer Circuit, when the weather was very hot, Baron Martin not only took off his wig and robes, but finding the cushion of his chair too warm, ordered something cooler to be put on it, and sat on a soap-box. In his combination of tenderness and robustness, and in other ways, he was not unlike Dr. Johnson, but without the learning and rhetorical power of his great namesake. He inspired all who knew him with affection; and although not a great lawyer, he must be reckoned an admirable judge.—*Law Journal*.

FILTHY PERCOLATIONS.

It is said in an early case that where one has filthy deposits on his premises, he, whose dirt it is must keep it that it may not trespass.¹ If filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbour's cellar, or finds its way into his well, it is a nuisance.² To suffer filthy

water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below it, is of itself actionable tort. Under such circumstances, the reasonable precaution which the law requires, is effectually to exclude the filth from the neighbour's land, and not to do so is of itself negligence.³ It is only sudden and unavoidable accidents, that could not have been foreseen or guarded against by due care, that can excuse a party from liability. Injuries from extraordinary accidental circumstances, for which no one is at fault, must be left to be borne by those on whom they fall.⁴ The soil of a man's estate may be rendered cold and unproductive, or the walls of his building weakened and made damp and unhealthy, and, in various other ways, his property injured for use or occupation by the percolation of water beneath the surface caused by some wrongful act of another. The wrongful act may, perhaps, be thawing water from one's roof so near the boundary line that it must escape upon adjacent premises.⁵ And it makes no difference whether damage is occasioned by the overflow of, or the percolation through the natural bank, so long as the result is occasioned by an improper interference with the natural flow of the water.⁶ The right of one to be secure against the undermining of his building by water, or the destruction of his crops or the poisoning of the air by stealthy attacks of an unforeseen element is as complete as his right to be protected against open personal assault or the more demonstrative but not more destructive trespass of animals.⁷

If one purchases land from another on which the vendor has erected or maintained a nuisance, while not liable for the erection of the nuisance, he is liable, after knowledge thereof, for all damages sustained by the other.⁸ But if one gathers water into a reservoir where its escape would be injurious to others, he must, at his peril, make sure that the reservoir is sufficient to retain the water

¹ *Tenant v. Goldwin*, 1 Salk. 360; S. C., 6 Mod. 311.

² *Tenant v. Goldwin*, *supra*; *Ball v. Nye*, 99 Mass. 582; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *St. Helens Chem-*

ical Co. v. St. Helens, L. R. 1 Exch. Div. 196; *Marshall v. Cohen*, 45 Ga. 579; S. C., 9 Am. Rep. 170; *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257; *Tate v. Parish*, 7 T. B. Mon. 325; *Green v. Nunnemacher*, 36 Wis. 50.

³ *Ball v. Nye*, *supra*; *Hodgkinson v. Ennor*, 4 B. & S. 229.

⁴ *Underwood v. Waldron*, 33 Mich. 232.

⁵ *Bellows v. Sackett*, 15 Barb. 96.

⁶ *Praxley v. Clark*, 35 N. Y. 520.

⁷ *Broder v. Sallian*, 2 Ch. Div. 692.

⁸ *Hurdman v. Northeastern R. Co.* 6 Cent. L. J. 367.

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which is gathered into it. If it be sufficiently constructed, the liability is only a question of negligence. The proprietor is not liable if the water escapes beyond the observance of due care proportioned to the danger of injury from the safety and mode of construction of the reservoir.⁹—*Central Law Journal*.

⁹ *Grey v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE SIXTH DIVISION COURT, COUNTY OF ONTARIO.

FOLEY V. MURRAY.

Defence setting up reformation of a contract involving a sum beyond the jurisdiction—Practice.

Although a defence may be established which would, in a Court of competent jurisdiction, reform or rescind a contract, the amount of which is beyond the jurisdiction of the interior Court, the proper course is to find for the plaintiff, payable within such time as to enable the defendant to take such action in another Court as he may be advised, to establish his rights, either by the reformation or rescission of the contract, or to damages for its non-fulfilment.

[Whitby, March 31st, 1883.]

DARTNELL, J.J.—The plaintiff sues for the first instalment of \$160, upon an agreement in writing whereby he agrees to sell, and the defendant agrees to purchase, a lot in Mara for the sum of \$1,800, a deed to be given and a mortgage taken when the first four instalments are paid. Nothing is said in this document about possession.

The defendant asserts and the plaintiff denies that there was any agreement about possession. I find the weight of evidence is overwhelmingly in favor of the defendant's contention that the plaintiff undertook to give him possession. It is submitted that this evidence is inadmissible, as varying or contradicting the written contract.

The defendant relies upon the verbal agreement. The plaintiff admits that there is a tenant upon the place under a lease which may or may not be a valid one. The real defence is that the plaintiff is estopped, or should be restrained, from enforcing his agreement, because he is unable to carry out the true agreement between him and the defendant. He also contends that this Court has no jurisdiction, as the title to land is in question.

I overrule this latter objection. There is no dispute as to the title to the land. The defence rests entirely upon the other objection to the plaintiff's right to recover.

Where property is sold, and the price is payable by instalments, and nothing is said about possession, it would appear that the vendee is not entitled to possession until payment of the last instalment: *Dart on V. & P.* 581; *Kenney v. Wexham*, 6 Madd. 335. *Omerod v. Hardman*, 5 Vesey, 722, is an authority to show that an additional parol stipulation as to the time for delivery of possession is inadmissible: (*Dart on V. & P.* 953). But, assuming it to be admissible, in order to give it effect, I am asked, in conceding to the defendant's contention, to vary, or reform, or rescind a written agreement, the subject matter of which involves a sum far beyond the jurisdiction of the Division Courts. Under these circumstances, I think it is my duty to find for the plaintiff for such sum as he may be entitled to, payable in 40 days, in order to give the defendant an opportunity, should she be so advised, to commence an action against the plaintiff. In such action she could claim a reformation of the contract, so as to accord with the true agreement between the parties, or a rescission thereof, if it should be shown the plaintiff is not in a position to carry it out; and also such damages as she may be able to show she has sustained by reason of its non-fulfilment. In the same action, the Court above could restrain all proceedings in this Court until such time as these questions could be determined. Or the defendant may, under the 78th sect. of the Judicature Act, apply for an order "that the whole proceeding be transferred from this Court to the High Court, or any division thereof."

The plaintiff claims interest on the unpaid purchase money. This is inequitable, as the purchaser is not in possession, and the plaintiff has in fact received the rent. Under all the

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circumstances, I feel it proper to find for the plaintiff for \$160, leaving the defendant, within the time allotted, opportunity to invoke the aid of a Court of competent jurisdiction to give her such relief as it may think her entitled to.

POLICE COURT.

(Reported for the LAW JOURNAL by R. J. Wicksteed,
Barrister-at-Law.)

METROPOLITAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS V. ANDERSON.

43 Vict. cap. 38, s. 2—*Ill-treating, abusing, or torturing animals.*

(OTTAWA, 2nd April, 1883.)

In this case the defendant was charged with withholding food and water from two horses locked up in a stable for four days, and the complaint by the Society alleged that by so doing he did "ill-treat, abuse and torture" these animals, contrary to the statute in this case provided (43 Vict. c. 38, s. 2.)

The defendant pleaded guilty, but the Police Magistrate was doubtful whether the case came under this statute, being of opinion that the words "ill-treats, abuses or tortures," refer to acts of commission, and not to acts of omission, neglect, or inattention. The Magistrate required the legal advisers of the Society to furnish authorities in support of their contention to the contrary.

The point reserved was argued in Chambers. The Society showed that the Halifax and New Brunswick sister societies had obtained convictions under same Act for same offence. The Report of the Royal Society for the Prevention of Cruelty to Animals was also filed. It contained reports of many convictions for starving horses, brought under Imperial Act 12-13 Vict. c. 92, s. 2, using the same words as the Canadian Act. For the prosecution was also cited the case of *Everitt v. Lewis*, 38 Law Times, 360, where it was held that "the owner of a horse, who, knowing it to be incurably diseased and in pain, merely omits to have it slaughtered, cannot be convicted of cruelly ill-treating, abusing, or torturing such animal, by reason of such omission only. But, if he keeps the animals in such a manner as that it is inevitably put to intense pain in moving about a field in its efforts to graze in

order to support its life, he thereby commits an act of cruelty, and an offence under the Act, and is guilty of 'torturing the animal, or causing him to be tortured,' as much as if he had actively tortured it with his own hand."

The case of *The Commonwealth v. Lufkin*, 7 Allen's U. S. Rep. 579, was also referred to. The complaint there was that the defendant "unlawfully and cruelly did beat and torture a certain horse," under General Statutes, United States, chap. 65, sec. 41. Judgment was rendered by Hoar, J. He says:—"Although the most common case to which the statute would apply is undoubtedly that in which an animal is cruelly beaten or is tortured for the gratification of a malignant or vindictive temper, yet other cases may be suggested where no such express purpose could be shown to exist, which would be within the intent as well as the letter of the law. Thus cruel beating or torture for the purpose of correcting an intractable animal; pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, we can have no doubt would be punishable under the statute, even if it did not appear that the pain inflicted was the direct and principal object."

O'GARA, Q.C., Police Magistrate, held that the case came within the statute. As to the punishment to be inflicted, he said that had it not been for representations made by the complainant on behalf of the defendant, he would have inflicted a very severe penalty, but as the defendant had pleaded guilty, and the Society had succeeded in establishing a valuable precedent, he only inflicted a fine of \$3, and \$2 costs.

Wicksteed, Bishop & Greene, Legal Advisers to the Society.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

From C. P.] [March 24.

BASSWELL v SUTHERLAND.*Bond for delivery of chattels—Performance excused by destruction of property.*

To an action on bond conditioned for the production of certain goods in default of payment by P. of certain moneys advanced by the plaintiff to him, and for securing which the plaintiff had obtained a chattel mortgage on the goods, the defendant pleaded that before the time for payment, and before the date specified in the bond for producing the goods, and before any breach of condition, the goods were accidentally destroyed by fire without any default of defendant, and the goods were not in existence when the plaintiff became entitled to their production.

Held, bad on demurrer for not negating default on the part of P. as to the destruction by fire of the property.

Per SPRAGGE, C. J. O.—The accidental destruction of the goods without default of the defendant or his principal, would excuse the performance of the contract.

The judgment of the Court of Common Pleas overruled the demurrer on the assumption that the pleas had been amended by negating default by P., but the appeal books not showing the amount to have been made the defence appearing thereon was considered bad on demurrer, and the appeal was allowed.

McCarthy, Q. C., and *Eddis*, for the appeal.

McPhillips, contra.

From C. P.] [March 24.

HOWARTH v. SUGAR MANUFACTURING CO.*Incorporated company—Hiring by the year—Improper dismissal.*

The defendants, a foreign corporation, elected directors to whom was delegated power to appoint such subordinates as might be necessary to carry on the business of the company. By power of attorney under the corporate seal of the defendants they appointed one H. their

general agent at Toronto, to take charge of the general management of their business there, and also giving him the management and control of the sub-agencies generally, and giving H. power to do everything necessary and requisite therefor as fully, to all intents, as the company could do if present. H. appointed the plaintiff a sub-agent for one year, which was renewed for some years at the end of each year. The letter appointing the plaintiff stated that he was appointed for a year, to be paid weekly the sum of \$15, together with certain commissions. During the currency of the years the plaintiff was summarily dismissed, and in an action for wages the defendants gave evidence to show that they were in the habit of engaging their agents and sub-agents at will only.

Held, affirming the judgment of the Court of Common Pleas, [SPRAGGE, C. J. O., dissenting], that the appointment from year to year was within the power of the directors which were delegated to H., their general agent, and that the plaintiff was entitled to rely upon such powers when he entered into the service of the company.

Per SPRAGGE, C. J. O.—Notwithstanding the knowledge of the defendants and their recognition, year after year, of the employment of the plaintiff, there was not any acquiescence in the terms of the engagement; and as it was shown that the practice of the defendants was to engage their employees at will only, the power of attorney, if it gave power to appoint sub-agents like the plaintiff, no power was given them to appoint for a year; and H. was not held out by the defendant company as having such authority.

Watson, for appellants.

C. Robinson, Q. C., contra.

QUEEN'S BENCH DIVISION.

[March 10.

MACDONALD ET AL. v. CROMBIE ET AL.*Interpleader—Judgment on non-appearance—Immediate execution—Irregularity—Referential Judgment—Sheriff's sale—Purchase by judgment creditor—R. S. O. ch. 118.*

An execution issued on the same day that a judgment on default of appearance is signed, contrary to Order IX. Rule 4, is an irregularity only, and not a nullity.

M., a merchant, who was in insolvent circumstances, and had purchased largely from defendants, started an account with the defendants as for cash due, in which were included some acceptances maturing, which were then delivered up to him, he receiving a buyer's discount of five per cent. By an arrangement, the defendants recovered judgment by default of appearance, and under an execution issued on the same day plaintiff's stock in trade was sold by the sheriff, the defendants becoming purchasers. E., the defendant's agent, wrote to the defendants before suit, that he had arranged with M.'s consent to issue a writ for judgment, and take everything, and they would then let M. go on and reduce his stock, and see what the Spring trade would do. The plaintiffs, ten days after, obtained judgment and execution under Rule 324, and the defendants having subsequently purchased the goods under these and other executions, an interpleader was directed.

Held, ARMOUR, J., dissenting, reversing the judgment of Armour, J., at the trial, that the defendants' judgment, execution, and purchase at the sheriff's sale were not a gift conveyance, assignment, or transfer of M.'s goods within the meaning of R. S. O. ch. 118, sect. 2.

Per CAMERON, J.—The statute R. S. O. ch. 118, should be construed strictly. It is in derogation of the common law, and does not operate to give all the creditors of a debtor a rateable share in his effects. Before setting aside the debtor's preference for a legislative preference not more honest, it should be clear that the debtor has done something which brings him within the enumerated acts which the statute prohibits.

— — —
HENEBERG v. TURNER.

Foreign judgment, action on—Rule 322—Motion for judgment—Evidence.

The defendant in an action on a judgment obtained in Iowa, U. S. A., pleaded, denying the recovery of the judgment. Upon a motion for judgment under Rule 322, upon the pleadings verified by affidavit, and the production of an exemplification of the judgment,

Held, affirming the opinion of the Master, that judgment could not be ordered on these materials under Rule 322, the defendant having put the judgment distinctly in issue.

In proceeding under this Rule 322, it is not sufficient to produce a document on which the plaintiff relies, without any proof to connect the defendant with it or support its genuineness.

— — —
SCRIBNER v. MCLAREN ET AL.

Stock-in-trade—Sale—Vendor employed as clerk—Immediate delivery—Change of possession—Chattel Mortgage Act—R. S. O. ch. 119.

M. carried on a retail business in a village store, on the premises known as the "Star House," from a design over the door, but there was nothing to indicate who was the proprietor. He sold the stock-in-trade to the plaintiff in August, and formally handed over to him the keys, at the same time telling M., his clerk, that he would not require him any longer. The plaintiff gave one key to M., telling him to open the store next morning, which he did, but the plaintiff next day quarrelled with M. and dismissed him, and he then employed M. until the 1st of October, to act as salesman, etc., the plaintiff being at the store a good part of the time. The change of business was advertised, and became well-known in the neighbourhood, and new books were opened by the plaintiff.

The stock was seized on the 2nd October, under execution against M. The transaction was found to have been in good faith and for valuable consideration.

Held, that the question of change of possession is one of fact to be determined on the circumstances of each case, and (reversing the decision of Osler, J.,) that there was here such an actual and continued change of possession as to dispense with the necessity for a bill of sale. Hagarty, C. J., dissenting.

Per HAGARTY, C. J.—The question being one of fact, and the learned Judge having found as a fact that the change of possession was not actual and continued, his finding should not be disturbed, as it could not be said to be clearly wrong.

— — —
HESSIN v. BAINE.

Married woman—Separate estate—Separate trader.

B. told the plaintiff that having failed he was unable to carry on business in his own name, and ordered goods to be shipped to the defendant, his wife, who was carrying on business as a

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

grocer, either on her or his order, the account to be opened in her name. Goods were shipped accordingly upon orders of the husband, and on one order of the defendant, and bills were drawn upon the defendant and accepted by her or in her name by her authority. She had separate estate.

Held, HAGARTY, C.J., dissenting, that the plaintiff was entitled to recover.

Per CAMERON, J.—The defendant was liable, being possessed of separate estate, whether the goods were bought by her or by her husband. In the latter case she would be surety for her husband as acceptor of bills drawn upon her for the price of the goods.

Per HAGARTY, C. J.—The goods were bought by the husband, and the liability was his and not the wife's, her name being used merely to shield him from his creditors, and the plaintiff being aware of this, and therefore the defendant was not liable to him.

WHITE V. CORPORATION OF GOSFIELD.

Municipal works—Drains—Non-repair—Action for damage—Mandamus.

The defendants in 1865 passed a by-law for the construction of a drain which passed through the plaintiff's land, and for assessing certain lands, including the plaintiff's, therefor. The drain was commenced in 1866 and completed. In 1873 they passed another by-law for widening and deepening this drain, which was accordingly done. In 1881, they constructed another drain running into the first below the plaintiff's land. The first drain having become out of repair and choked up, the plaintiff's lands were to some extent flooded in the spring and autumn, and the water lay longer than if the drain had been kept properly clear.

Held, affirming the judgment of Hagarty, C.J., (Cameron, J., dissenting), that the plaintiff was entitled to recover against the defendants for their breach of duty in not keeping the drain in repair under R. S. O., ch. 174, sec. 543, and that a *mandamus* should issue to compel the defendants to make the necessary repairs.

Per CAMERON, J.—An action is expressly given by sec. 342 for injury done by such neglect, where the drain serves two municipalities, but in a case like the present, though under sec. 543 the municipality may be compelled by *man-*

damus to repair the drain at the expense of the lands benefitted, no action lies for injury caused by non-repair.

REGINA V. WALSH.

Canada Temperance Act, 1878—Conviction—Hard labour—Proof of Act being in force—Jurisdiction of magistrate—Certiorari—Several offences.

The defendant was convicted of selling intoxicating liquor contrary to the Canada Temperance Act, 1878, upon an information charging him with keeping, selling, and otherwise unlawfully disposing of and bartering liquor. He was adjudged to pay a fine of \$50 and \$5.20 costs, and in default of payment, and of sufficient distress, he was adjudged to be imprisoned in the common gaol at hard labour. A second record of the conviction, bearing the same date as the first, was filed, differing in some minor points from the first, and omitting the adjudication as to hard labour, and adjudging the payment of \$5.27 costs. The proceedings having been removed by *certiorari*,

Held, that the first conviction was bad for want of jurisdiction to impose hard labour, which is not authorized by the Act; and that the second was bad in not following the actual adjudication as to costs, which were, as shown by the magistrate's minute, \$5.20, and not \$5.27.

The Canada Temperance Act does *per se* make the selling of intoxicating liquor an offence. It is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part, which proceedings cannot be judicially noticed but must be proved, and in the absence of such proof the magistrate acts without jurisdiction.

Held, therefore, that the convictions were bad, for they did not allege that the Act was in force, nor was it proved otherwise, and, therefore, as the jurisdiction of the Magistrate did not appear, the writ of *certiorari* was not taken away by sec. 111 of the Act.

Quare, whether the convictions were not also open to objection on the ground that the information embraced more than one offence, and whether the Magistrate having in this respect disregarded the express directions of the Act 32 and 33 Vict., c. 51, sec. 25, made applicable by,

the Canada Temperance Act, he might not be said to have acted without jurisdiction.

Quære, whether sec. 111 takes away the *certiorari* in all cases, or only in cases coming under sec. 110.

Fenton, for the Crown.

Tizard, *contra*.

Divisional Court.]

[March 10.]

HATELY V. MERCHANTS DESPATCH CO.

Carrier—Damage to goods carried—Action by consignor—Nonsuit—New trial—Joinder of consignee as co-plaintiff—Constitutional question—Notice to Attorney-General.

The plaintiff consigned a quantity of butter to parties in England, and shipped it by the defendant, on bills of lading describing the goods as shipped by the plaintiff to be delivered to —, or order, or his assigns, he or they paying freight. The plaintiff endorsed the bills of lading. The consignees paid the drafts drawn upon them for the price, and the butter having been seriously damaged in transit, they made claim upon the plaintiff for the loss. The plaintiff sued the defendants for the damage, and was non-suited on the ground that he had not sufficient interest or was not the proper person to sue.

The Court, without holding that the plaintiff had no right of action, or deciding as to the effect of R. S. O. cap. 116, sec. 5, set aside the non-suit and directed a new trial, with leave to the plaintiff to add as co-plaintiff any or all of the consignees or endorsers of the bills of lading; the evidence already given to stand with any additions the parties might desire, reserving all costs.

The validity of R. S. O. cap. 116, sec. 5, was challenged on the ground that it was *ultra vires* as interfering with trade and commerce, but the Court refused to decide the point now, without notice to the Attorney-General and Minister of Justice, under 46 Vict. cap. 7, sec. 6 (O), which would involve great delay, the course adopted being the speediest and least expensive.

Moss, Q.C., and *Lees*, for plaintiff.

Oster, Q.C., *Kerr*, Q.C., *Cassels*, *Plumb*, and *Miller*, *contra*.

CHANCERY DIVISION.

Proudfoot, J.]

[April 4.]

RE McCAUGHEY V. WALSH.

Striking solicitor off the rolls—Misconduct of partner.

To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to show that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The Court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partners' acts—much less will the Court exercise this penal power over a solicitor to whom no blame is ascribed. *St. Aubyn v. Smart*, L. R. 3 Ch. 646, distinguished.

J. H. Macdonald, for the motion.

Hoyles, *contra*.

Divisional Court.]

[April 5.]

WITHROW V. MALCOLM.

Re-issue of patent—Patent Act of 1872.

As to the plaintiff's first patent,

Held, [reversing *FERGUSON, J.*], there had been no infringement as regards the first and third claims; as regards the second claim, the patent was bad for want of novelty.

As to the sixth claim of the re-issued patent, there appeared to be an infringement, if the re-issued patent was valid. The defendants objected that the re-issued patent contained combinations not in the surrendered patent or application therefor, and that it was therefor invalid. It appeared that the sixth combination of this re-issued patent was displayed in the drawings described in the application, but not separated from the other parts of the description, and made the subject of a distinct claim so as to be protected by the first patent.

Held, per *BOYD, C.*, the re-issued patent was nevertheless valid: per *PROUDFOOT, J.*, *contra*.

Per *BOYD, C.*—The commissioner had jurisdiction to grant the re-issue, for the commissioner has power to re-issue and include therein a claim, which was described in the original, but, through inadvertence, accident or mistake, not

claimed or patented there, provided there has been no *laches*.

What could have been claimed as part of the invention under the specifications and descriptions accompanying the original patent, but was not, by reason of error, mistake or inadvertence, may be claimed on a re-issue if there has been no *laches*. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application is the measure of his rights on a re-issue.

Under our Patent Act of 1872, which differs slightly from the analogous provision now in force in the United States, R. S. U. S. sect. 4916, a re-issue is permissible whenever the claim is, through inadvertence, accident, or mistake, *defective, i. e.*, by reason of the applicant not claiming all of his invention that might be claimed under the description.

Per PROUDFOOT, J.—A re-issued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872, to say it authorizes a re-issue "with broader and more comprehensive claims," if by that is meant that it authorizes a re-issue with a claim not in the original patent at all. Neither is it enough to entitle the inventor to a re-issue to allege that all the elements of his new claim may be found in the specification; what the 19th sect. of the Patent Act of 1872 provides is, that a re-issue may be had if the claim is so imperfectly described, through error or mistake, as not to cover the invention. Here the sixth claim in the re-issued patent did not remedy any defect in the original claim. It was an addition of an entirely new device or combination.

The earlier decisions in the United States on the subject of re-issues are more in conformity with the language and intention of our Patent Act, which is similar to that of the United States, than the later decisions, which seem to recognize the right in the re-issue to broaden the claims in a manner that does not appear to be in accordance with the law.

American decisions reviewed at length on the subject of re-issued patents.

S. H. Blake, Q. C., and W. Cassels, for the appellants.

J. Macdougall and Shepley, contra.

PRACTICE CASES.

Proudfoot, J.]

[Feb. 19.

PURDY V. PARKS.

Mortgage—Costs—Reference.

In a mortgage suit it was referred to the Master to ascertain whether a sale or foreclosure was more beneficial, and to take an account, etc. On the reference the defendants claimed credit for certain payments endorsed on the mortgage in the handwriting of the deceased mortgagee, but for which they did not hold receipts.

On a revision of the taxation, the taxing officer at Toronto disallowed the costs of the reference, as the Master had found in favour of the defendants as to the payments.

On appeal, PROUDFOOT, J., allowed the plaintiffs the costs occasioned by the enquiry as to the sale or foreclosure, and the defendants the costs caused by the taking the account.

Foster, for the plaintiff.

Harcourt, contra.

Mr. Dalton.]

[Feb. 26.

STEWART V. BRANTON.

Costs—Stay—Condition—Rule 428 O. J. A.

In an action against the bail, an order was obtained staying proceedings on the render of their principal upon payment of costs. These costs not being paid, execution issued, and a motion to set aside the execution was dismissed, the Master in Chambers holding that the words, "upon payment of costs," were words of agreement, and the costs not being paid, the execution should stand.

Motion dismissed with costs.

Clement, for the plaintiff.

G. H. Watson, for the defendants.

Mr. Dalton.]

[March 7.

GUELPH V. WHITEHEAD.

Production.

Action to restrain the infringement of a patent.

The solicitor for the defendant procured from the United States patent office, copies of certain American patents, to be used on his behalf.

Held, that defendant was not bound to produce them.

H. Cassels, for plaintiff.

Hoyles, for defendant.

Osler, J.]

[March 10.

RE BURDETT (A SOLICITOR).

Taxation—Bill of costs—Division Court.

A solicitor sued his client in the Division Court for the amount of a bill of costs, and judgment was reserved.

Held, that a taxation was properly ordered by the Master in Chambers, pending the delivery of the judgment.

Shepley, for defendant.

Aylesworth, for the plaintiff.

Boyd, C.]

[March 12.

BANK BRITISH NORTH AMERICA V. EDDY.

Jury notice.

The cause of action was one of a purely common law character, and the pleadings presented issues of a merely equitable character.

An order of a local Master striking out a jury notice was reversed on appeal.

W. Fitzgerald, for the plaintiff.

H. Cassels, for the defendant.

Osler, J.]

[March 13.

AGNEW V. PLUNKETT.

Costs—Solicitor's letters to his agent.

The solicitors for both parties resided in Meaford, County of Grey.

Held, that necessary and proper letters in the action, written by the defendant's solicitor to his agent in the Town of Owen Sound (the county town of the County of Grey), should be allowed.

Holman, for the defendant.

Hagarty, C. J. }

Mr. Winchester. }

March 13.

MCDONALD V. MURRAY.

Appeal—Stay of proceedings—New trial.

In this case the plaintiff was allowed to proceed with a new trial pending the defendant's appeal to the Court of Appeal, on the ground that he would be considerably inconvenienced by a delay of proceedings, and that an important witness was on his way from Winnipeg to give evidence at the trial.

Application for stay of proceedings refused.

J. K. Kerr, Q.C., and *Holman*, for plaintiff.

Ogden, contra, for the motion.

Boyd, C.]

[March 13.

LAMBIER V. LAMBIER.

Administration—Partition—Consolidation of conflicting applications—Jurisdiction of Local Masters—G. O. Chy. 638-640—Rule 395 O. J. A.

A motion to a Judge in Chambers, under Rule 395 O. J. A., to consolidate conflicting applications for administration or partition, under G. O. Chy. 638-640, is improper, as that rule is not intended to apply to these summary applications.

The Local Masters are the proper officers to deal with such motions.

See *Re Draggan*, 8 P. R. 330.

Plumb, for the motion.

Rull, contra.

Mr. Winchester.]

[April 10.

KITCHING V. HICKS ET AL.

Adding parties as defendants—Rule 103 O. J. A.

The plaintiff claimed a lien on certain goods and chattels of the defendant Hicks under an unregistered agreement in the nature of a chattel mortgage.

The defendant Clarkson took possession of the goods, as assignee of the defendant Hicks, for the benefit of his creditors.

Held, on motion to add Clarkson and the execution creditors as parties, defendants, in the action; that they had a substantial interest in the subject matter of the action, and should be added as parties, defendants, under Rule 103 O. J. A.

Akers, for the motion.

Hoyle, contra.

Hagarty, C. J.]

[April 10.

SMITH V. SMITH.

Absconding debtor—Residence.

The husband of the plaintiff separated from her in 1878, and went to reside in the United States. Prior to his death in November last, in the State of Michigan, he sold a farm in Dakota. The defendant, a brother of the deceased, residing in Dakota for the last four or

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.—FLOTSAM AND JETSAM.

five years, while visiting his father in the County of Bruce, was arrested at the instance of the plaintiff, who had taken out letters of administration of her husband's estate, as an absconding debtor, the affidavits filed alleging that he had received the purchase money of the farm sold by his deceased brother.

HAGARTY, C.J.—I cannot put this plaintiff's rights higher (if they can be put so high) than those of the husband, if now living. A man returning to the country of his ordinary abode, where the debt was contracted, where his property is, and where his creditor also resided up to his death, cannot, I think, with propriety be charged as leaving Ontario with intent to defraud his creditors. The defendant must be discharged from custody, the bail bond delivered up to be cancelled, and no further proceedings taken on the *capias*. I leave the writ for the protection of the sheriff, costs to the defendant in any event.

C. Millar, for the plaintiff.

H. J. Scott, for the defendant.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Is the jury system a failure?—*American Law Reg.* Feb.

Warranties implied in sales of personal property in the United States and Canada.—*Ib.* Feb. and March.

[This is a very valuable article, and should be read in connection with "Benjamin on Sales." It is too long for reproduction in our crowded space.—EDS. L. J.]

Evidence — *Res gestae* — (Continued) — *Central L. J.*, Jan. 19.

The compensation of experts.—*Ib.*

Excuses for notice to a drawer of a bill of exchange.—*Ib.*, Jan. 26.

Evidence — Peculiarities of handwriting.—*Central L. J.*, Feb. 9, 16.

Sealed instrument executed in blank.—*Ib.*, Feb. 23.

Supplying dangerous goods.—*Ib.*

Graveyard law.—*Ib.*, March 2.

The act of God.—*Ib.*, March 9.

The admissibility of character in civil actions.—*Ib.*, March 16.

Entirety of contract for personal services.—*Ib.*

Married women's debts.—*Ib.*, March 30.

Mortgages and powers of sale.—*Ib.*

Limitation of the doctrine of the dissolution of a corporation by the death of all of its members
Southern Law Rev., Feb., March.

Negotiable instruments—Collateral stipulations
—*Ib.*

Corporate creation and existence.—*Ib.*

Presumptions in indictments for conspiracy.—*Ib.*

Conditions in pardons.—*Ib.*

Auctions and auctioneers.—*Ib.*

[This is a valuable article, and might usefully be reprinted in book form.—EDS. L. J.]

Surface water.—*American Law Mag.*, Feb.

Trespassing animals.—*Ib.*

The grand jury.—*Criminal Law Mag.*, March.

The freedom of the navigation of the Suez Canal.—*Law Mag.*

The British peerage and jurisdiction and procedure of the House of Lords as to the peerage.—*Ib.*

The new Alabama law on the evidence of defendants in criminal cases.—*Ib.*

Interlopers on railways.—*Albany L. J.*, Jan. 20

Nuisance of noxious trades.—*Ib.*, Feb. 3.

Criminal liability of physician for death produced by his gross negligence.—*Ib.*, Feb. 10.

Rules relating to opinion evidence.—*Ib.*, Feb. 17.

Icy sidewalks.—*Ib.*, March 24.

Leases and agreements for leases.—*London L. J.*, Jan. 13.

Nationality by inheritance.—*Ib.*, Feb. 10.

Solicitors acting professionally against former clients.—*Irish L. T.*, Jan. 27, *et seq.*

Criminal attempts.—*Ib.*, March 10, *et seq.*

FLOTSAM AND JETSAM.

The *American Law Magazine*, of Chicago, has ceased to exist—merging in the *Central Law Journal*, of St. Louis, one of the best conducted legal journals in the United States.

An acute correspondent writes:—"Will you not favour us with a full report of *Clapp v. Boston*, noted in your last number, p. 38? My interest in it is indeed rather scientific than professional, because I am burning with longing to know how to 'erect a well.' And in such case does the truth, which is at the bottom of it, 'go up' with it?" But has not our correspondent heard of petroleum wells that have "gone up."
—*Albany Law Journal*.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely:—

William Renwick Riddel, Gold Medalist, with honours; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks,

From	Arithmetic.
1882	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum.
1883.	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
1884.	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
1885.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar. Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard. The Traveller.

Canada Law Journal.

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No. 9.

DIARY FOR MAY.

1. Tues... Supreme Court Session begins. Primary Examination.
2. Wed.... Primary Examination. J. A. Boyd appointed Chancellor, 1881.
3. Thurs... Ascension Day.
4. Fri.... Napoleon Bonaparte died, 1821.
5. Sun.... *First Sunday after Ascension.*
8. Tues... Co. Ct. Sitt. for York begin. Ct. of App. sitt. begin. First Intermediate Examination.
9. Wed.... First Intermediate Examination.
10. Thurs... Second Intermediate Examination.
11. Fri.... Second Intermediate Examination.
12. Sun.... *Whit Sunday.*
15. Tues... Examination for Certificate of Fitness.

TORONTO, MAY 1, 1883.

WE call the special attention of solicitors and the taxing officers to the note of the decision in *Gage v. Canada Publishing Co.*, in our present number.

WE are indebted to the courtesy of Mr. Bruce, the Registrar of the Maritime Court, for the important judgment in the case of the tug *Royal*, which we publish in another place.

WE are quite sure that the *Legal News* is sincere in thinking that *Grant v. Beaudry* has received sufficient attention. It has been driven to admit that its article abusing one of the Judges of the Supreme Court for overruling a judgment of the Queen's Bench of Quebec, was written by Mr. Justice Ramsay, a Judge of the latter Court. We have done our duty in exposing this most objectionable proceeding, and so leave it.

MR. C. P. BUTT, Q. C., M. P. for Southampton, has been appointed to succeed Sir

Robt. Phillimore as Judge of the Probate, Divorce and Admiralty Division. Sir Wm. B. Brett succeeds the late lamented Sir George Jessel as Master of the Rolls, and is the first Lord Justice who has taken that position. Mr. Justice Fry takes the seat thus vacated by Lord Justice Brett. Mr. Justice North has been transferred to the Chancery Division, and Mr. Archibald Levin Smith has been raised to the Bench, taking his place.

WE have received through Messrs. Row-sell & Hutchison, a copy of Sir James F. Stephen's very valuable "History of the Criminal Law of England," recently published by Messrs. Macmillan & Co. Sir James Stephen's fame as a writer on all matters of criminal law has for long been so well established, that the high commendation that this his latest work has received from critics on every side is matter for no surprise. We trust in a future issue to be able to give our readers some more extended notice of the contents of the book, which will doubtless be read by all students of Criminal Law and general jurisprudence.

WE understand Chief Justice Wilson took occasion recently to protest against the un-seemly practice of barristers putting on their robes in open Court. We think the learned Chief Justice did well in thus objecting to the Courts being turned into robing rooms. It is not only juniors who are offenders in this respect. We have ourselves seen a learned member of the inner bar, whose profound respect for the Bench is beyond question, yet heedlessly enter Court while in

EDITORIAL ITEMS.—THE TORRENS SYSTEM OF LAND TRANSFER.

session, take up a prominent position in front of the Bench, turn his back on the Judges, and proceed to array himself in his robes. Such a proceeding would in many quarters have met with a severe rebuke, and we are inclined to think a Court errs on the side of leniency in allowing it to pass altogether unnoticed.

While on the subject of etiquette, we may remark that we have sometimes been tempted to think that when a Judge comes into Court, and bows politely to the assembled bar, the least the bar can do is politely to return the salutation. The trouble is that the practice of the learned judges is not uniform, and the salutation from the Bench is indistinguishable from the mere bending of the body necessary for the purpose of assuming a sitting posture.

ONE of the earliest acts of the new Master of the Rolls as the President of the Court of Appeal, has been to overrule a decision of his predecessor the late Sir George Jessel. In the case of *Vavasour v. Krupp*, 15 Chy. D. 474, that learned Judge held that if the plaintiff discontinue an action, the defendant who has pleaded a counter claim, cannot proceed with the action in order to enforce the counter claim. In *Gathercole v. Smith*, 7 Q. B. D. 626, it was held that no judgment could be given for the defendant, on a counter claim which could not be set off against the plaintiff's claim, even though it was established in evidence. Bramwell, L.J., however, expressed a strong dissenting opinion, and considered that in such a case an independent judgment should be given for the defendant. The Court of Appeal in England have recently in the case of *McGowan v. Middleton*, (*Law Times*, 14th April, p. 438,) expressly overruled *Vavasour v. Krupp*, and we presume that *Gathercole v. Smith* is also incidentally affected by the decision. *Vavasour v. Krupp* was opposed to the opinions expressed in the earlier decisions of *Stooke v. Taylor*, 5 Q. B.

D. 569; 43 L. T. 200; and *Winterfield v. Brodnum*, 3 Q. B. D. 324, 326; 38 L. T. 250; and was also questioned by Fry, J., in *Beddall v. Maitland*, 17 Ch. D. 174; 44 L. T. 248. We certainly think that the decision of the Court of Appeal in *McGowan v. Middleton*, more correctly accords with the spirit and intention of the Judicature Act than either *Vavasour v. Krupp*, or *Gathercole v. Smith*. It is not difficult to see that very serious injustice might result to a defendant who after he has been at the trouble and cost of establishing a counter claim, nevertheless, at the end of the litigation fails to recover a judgment for what he has proved himself entitled to, or who is driven to commence proceedings *de novo*, merely because the plaintiff chooses to discontinue the action. As the Master of the Rolls indicates, the fundamental intention of the Judicature Act is that when two parties are once before the Court, all matters in controversy between them are, as far as possible, to be finally determined.

THE TORRENS SYSTEM OF LAND TRANSFER.

THIS system is now in force in the five Australian Colonies, and in New Zealand. The English Act of 1874 is based upon it, and the Irish Landed Estate Courts issue absolute certificates of title similar to those issued under the Torrens system, from which time the title become practically indefeasible.

The Torrens System has been in force in South Australia since 1858, and has proved a complete success. "Indefeasibility of title has been practically secured" is the report of the Attorney-General to the Colonial Secretary in 1870, and such is the general report from all those Colonies.

The advantage of the Torrens system is that it is a register of *owners*, not of *titles*. Land is brought under the Act in a somewhat similar manner to that in which titles are

THE TORRENS SYSTEM OF LAND TRANSFER.

quieted in Ontario, but with less "red tape." When quieted a certificate is issued to the owner, which is as good as a Patent from the Crown. When the owner wants to sell, he fills out a short transfer, and hands it with the certificate to the purchaser, who takes it to the Registry Office, and surrenders the old certificate, registers the transfer, and receives a new certificate that he is the owner.

Mortgages and leases are effected in the same short and easy style. All the ordinary covenants are implied, and there is a statutory power of sale implied in every mortgage.

As "accidents will arise in the best regulated families," in order to make provision that no person may lose anything by the mistakes of officers in passing defective titles, there has been established in Australia an assurance fund. This fund arises from a charge of one-fifth of one per cent. of the value of land brought under the Act in the first instance, and a succession duty of a like amount. The assurance funds in 1870 in the several colonies amounted to about \$100,000, and the claims had been merely nominal.

One difficulty which presents itself to most lawyers is how the certificate of title is to be adjusted when a testator leaves a complicated will. In Ontario until the law of descent is altered to correspond with law of personal property, as it is in New South Wales, it will be necessary for the person claiming under the will to produce the certificate of title of the testator, and the will. The will is then referred to the Land Commissioners, who certify who is entitled under the will. A *fiat* of a Superior Court Judge is then got confirming such finding when the certificate is issued. The devise may be to a woman for her life, with remainder to children in fee, subject to the payment of legacies. When an intending purchaser sees the certificate, he knows exactly what charges there are against the property, and exactly who is entitled to sell. In more complicated cases, the rights of persons claiming the certificate would have to be established by the Court. Instead of the pre-

sent practice of putting a will on registry, and getting innumerable different opinions as to its construction, and leaving it a festering sore and perplexity to conveyancers for years, every question of ownership is settled before a man's title can be recorded.

I will conclude this brief sketch by a short extract from a report of one of the Australian Registrars to show his opinion of the advantages of the system :—

"This Colony having now been settled for nearly 67 years, the titles to property are in many cases long and intricate, and not a few of these have passed through this office. "No great trouble, however, has arisen in dealing with them, and the result of my experience on this point is, that so long as a title is *really sound*, its length or complication is of no great moment, and presents no serious difficulty. I may add that it is precisely in these cases, where a bulky pile of deeds, liable to loss, and utterly unintelligible to the vulgar, entailing lengthy abstracts of title, and heavy law charges upon everyone dealing with the property, are exchanged for a simple certificate of title, that the greatest sense of relief is experienced by the landowner. The ease and expedition with which mortgages, transfers, leases, etc., are effected, constitute one of the greatest advantages of the system. Instead of the slow process of inquiry into the title of the mortgagor or vendor carried on by lawyers, under the old method of conveyancing, instead of the inevitable delay and expense occasioned by furnishing abstracts of title, and by the preparation of long and costly deeds, the whole transaction under the new system can be completed in a few minutes without the aid of legal advice, and at the very trifling expense of the registration fees ; in fact, it is an every day occurrence for parties to come to the office, sign the proper forms filled up by the clerk according to their instructions, pay over the purchase money, or the amount lent, there and then at the counter, and walk off with the business completed. It is almost needless to point out what an

PULLMAN CAR CO. LIABILITY.

important advantage this combination of speed and cheapness must be to land holders of all classes. Nor are the means of releasing or assigning mortgages less simple, a mere short endorsement on the instrument in either case effecting the desired object in a few minutes. The process of foreclosing upon default is also simple, speedy and effectual. Leases are registered with the same facility, usual and ordinary covenants being condensed by the use of abbreviated terms prescribed by the Act, special agreements only being set forth in full."

BEVERLEY JONES.

SELECTIONS.

PULLMAN CAR CO. LIABILITY.

The recent decision of the Supreme Court of Illinois in *Nevin v. Pullman Palace Car Co.*, has been pretty generally announced with quite a flourish of trumpets, by the lay press, (and, indeed, several law journals have fallen into the same error), as settling the disputed question as to whether sleeping car companies are common carriers and liable as such. We have not yet seen a full report of the decision, but judging from the headnote of Mr. Freeman, the reporter of the court, and the newspaper accounts which we have seen, the court decides nothing of the kind; but simply that the business of running sleepers has become a social necessity, and that there is upon the company an obligation to furnish accommodations to those who desire them, similar to that imposed upon common carriers, ferrymen and inn-keepers. The court is quoted as saying: "When, therefore, a passenger who, under the rules of the company, is entitled to a berth, for the usual fare, and to whom no personal objection attaches, enters the company's sleeping-car at the proper time for the purpose of procuring accommodation, and in an orderly and respectful manner applies for a berth, offering or tendering the customary price therefor, the company is bound to furnish it; provided it has a vacant one at its disposal. For a breach of any of these implied duties, the court holds the company clearly liable." This is

a very different thing from imposing upon them the multitudinous and onerous obligations and liabilities of common carriers, proper. Thus it is more than doubtful whether any court would regard this decision as conflicting with the doctrine established in *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *Diehl v. Woodruff*, 10 Cent. L. J. 66, and *Blum v. Southern Palace Car Co.*, 3 Cent. L. J. 591, that the sleeping car companies are not liable for baggage of passengers stolen or lost while in the car, either as common carriers or innkeepers, but simply for the use of reasonable care and diligence; that is, they are in no sense insurers, but simply bailees for hire. This view of the law is supported by reason as well as authority. There is no sort of analogy of circumstances by which these "flying nondescripts," as Judge Thomson calls them in his work on Carriers of Passengers, p. 531, can be regarded as inns. We know of no better summary for the reasons for regarding them as distinct, than that contained in the charge to the jury of Judge Brown, of the Western District of Tennessee, in the case of *Blum v. Southern Pullman Palace Car Co.* 3 Cent. L. J. 592. The substance of the reasons there stated is briefly: 1. The peculiar construction of sleeping cars is such as to render it almost impossible, even with the most careful watch, to prevent the occupants of berths from being plundered by occupants of adjoining sections. 2. The innkeeper is compensated for his extraordinary liability by a lien upon the goods of his guest for the price of entertainment. The sleeping car company has no such lien. 3. The innkeeper must receive every guest who applies for entertainment. The sleeping car company receives only first-class passengers traveling on that particular road, and it has not yet been decided that it is bound to receive those. [This, however, is the very point, and the only one, settled by *Nevin v. Pullman Palace Car Co.*, so far as we have been able to learn.—Ed. Cent. L. J.] 4. The innkeeper is bound to furnish food as well as lodging, and receive and care for the goods of his guest, and his liability is unrestricted in amount. The sleeping-car furnishes no food, but a bed only, and receives no luggage or goods. 5. An inn is an imperative necessity to a traveller. The sleeping car is a luxury, and the traveller by rail is not obliged to avail himself of it. 6. The innkeeper has absolute control over his premises and may exclude every one but his

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[Vice Adm. Ct.]

servants and guests. The sleeping car is obliged to admit the employees of the train to collect fares and control its movement. 7. The sleeping car cannot even protect its guests, for the conductor of the train has the right to put them off for non-payment of fare or violation of its rules and regulations.

Still less can the sleeping car company be considered a common carrier, for the actual contract of carriage is made with the railroad company.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE SURROGATE COURT OF THE COUNTY OF ONTARIO.

IN THE GOODS OF M. G. SULLIVAN.

Danger of loss of goods—Appointment of curator until grant of administration.

Where a proper case is made out, shewing danger of the intestate's goods being made away with, the Court has the power to appoint a curator of the chattels, until such time as letters of administration can be obtained in due course.

[Whitby, April, 1883.]

N. F. Paterson applied for an order under the circumstances set out in an affidavit which he filed.

It appeared from the affidavit, that the widow and next of kin of the deceased were unwilling to act, that one Barker, a creditor, had taken steps to apply for letters of administration, but that the papers were not complete, although in course of preparation. That creditors and others were removing, or attempting to remove, goods of the intestate, and that, unless some order be made by the Court to secure them until formal letters were granted, there was danger of loss to the estate.

DARTNELL, J.J.—On consideration, I think this application should be granted. Before the establishment of the Court of Probate in England, in 1857, the personal estate and effects of a deceased vested in the ordinary, who in most cases was the bishop of the diocese. The 19th

section of the English Probate Court Amendment of 1858 Act, 21-22 Vict. cap. 95, enacts that "from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the Judge of the Court of Probate for the time being in the same manner and to the same extent as heretofore they vested in the ordinary."

The Surrogate Courts established in Upper Canada in 1859, are the successors of the Court of Probate established in 1793 by 33 Geo. III. c. 8, and the practice of these Courts, where not otherwise provided for, "shall, so far as circumstances of the case will admit, be according to the practice in Her Majesty's Court of Probate in England as it stood on the 5th day of December 1859:" (R. S. O. c. 46, sec. 32).

No property vests in an administrator until appointed by the Court, and then only by virtue of his being an officer of that Court. "A stranger may be appointed, *ad colligendum bona defuncti*," to do what is necessary for the preservation of the property, and to the safe keeping of the same, to abide the directions of the Court: *In the goods of Randell*, 2 Add. 232.

I think an order may go in these terms, appointing Mr. Barker a curator of the property until letters of administration be granted. He is sworn to be a creditor of the estate, and that he is the party by whom application will be promptly made for a grant of letters to him, which will be unopposed by the next of kin.

Order accordingly.

QUEBEC.

VICE ADMIRALTY COURT.

IN RE TUG "ROYAL."

Master's wages—Jurisdiction—Disbursements—Costs

In a suit of the master of a steam tug against the owner for wages and disbursements.

Held, (1) That a Vice-Admiralty Court cannot under "The Vice-Admiralty Court Act, 1863," exercise its jurisdiction so as to give effect to an agreement between the owner and master of a vessel,

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RE TUG "ROYAL"

[Vice Adm. Ct.]

where the duties to be performed are miscellaneous and not incident to the situation of a master.

(2) That by the Dominion Statute, "The Seamen's Act, 1873," the jurisdiction of this Court as respects vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia being restricted to claims for master's and seamen's wages over \$200, the 189th and 191st sections of the Imperial Merchant Shipping Act, 1854, were so far repealed as to reduce £50 sterling, to \$200.

(3) That the "Vice-Admiralty Court Act, 1863," has not in any other way affected or repealed the 189th and 191st sections of the "Merchant Shipping Act, 1854."

(4) That in a suit for ship's disbursements brought by the master who became liable upon condition that if the owner did not pay them he would, there must be a demand on the owner before suit.

(5) Where a master sues for ship's disbursements, without first presenting his accounts he cannot recover costs.

[QUEBEC, April 6, 1883.]

The facts fully appear in the judgment of Hon. G. OKILL STUART, J.—This is a suit of Pierre Raphael Baron, who was master of the steam tug *Royal*, a vessel registered in this Province, and owned by Helena Maria Kelly, wife of John Griffin Burns, against that vessel for wages as master, for work, and by reason of liabilities for necessities, on the following statement:—

For the season of navigation in 1880 (1st May to 22nd November), less one month, wages at \$45 a month, \$258 ;	
less \$151 paid on account	\$107 00
For the season of 1881, at \$45, \$307.50 :	
less \$283.50 on account	24 00
For part of the season 1882 (1st May to 15th July)	111 50
1882, July—18 cords of firewood purchased at Batiscan	40 50
8 tons of coal purchased at Sorel	50 00
Duchesneau, blacksmith	13 62
Boy, "	7 00
	\$353 62

The libel states the services of the promotor as master, for the seasons of 1880-1, and part of 1882, and continues to allege that he acted as pilot, agent, carpenter, and performed numerous other duties.

There is a plea to the jurisdiction to which the respondent excepts, upon the ground that

the promotor was not engaged as master but as an agent for the tug *Royal* and the tug *Challenger*, to secure employment for these vessels, at \$45 a month. That he discharged this duty for the *Royal* until the 16th of August, 1880, and for the rest of that season he was employed for the *Challenger*, for which it is admitted that there is a balance of \$68 due to him. For the season of 1881, it is alleged that the *Royal* was chartered by the Quebec and Levis Tow Boat Company, and that by them the promotor was paid in full \$40 a month, and as respects the season of 1882, the promotor acted as master at \$40 a month, on account of which he has received \$46, leaving due to him, \$24.60.

The jurisdiction is not excepted to as respects the liabilities, for what were really disbursements and not necessities, as stated in the libel. If they were the latter, this Court could not award them owing to the residence of the parties in the same locality. The respondent denies her liability for the disbursements, and has pleaded that the promotor has not paid them.

There can be no doubt that the agreement was for the promotor to act as sub-agent for the tugs, and as master or pilot when and if required. Indeed, it so appears from the evidence of the promotor. In the season of 1880, until the 14th of August from the 9th May, he discharged his duty under the agreement for the *Royal*. He then became master of the *Challenger* for a month or more. One Joseph Flamand had been master of the *Royal* until the 24th September. He then left her; the promotor took his place as master for about two weeks, when her pilot, Dubuc, was appointed, and so continued through the rest of the season. The exclusive duty as master for the period he so served, would entitle the promotor to \$22.50 as master's wages.

For the season of 1881, the agreement was continued, but the *Royal* being under charter to a company, they would not give the promotor more than \$40 a month, which he took under protest. The additional \$5 a month he would be entitled to under the renewal or continuation of the agreement of the previous year, making \$24, but not as master, for during this season it appears that he acted as carpenter, as painter, painting the tug himself, and as watchman. Having been paid for the entire season by the company, except the \$24, it is impossible to say that this was master's wages. It would thus

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necessarily be classed with the \$68, making \$92 for miscellaneous work. The agreement does not appear to have been continued for the season of 1882, but the promoter acted as master until the 15th July, when he was discharged by Burns, for which period there appears to be a balance of wages amounting to \$24.60. This, with the sum due for wages alone in 1880, viz., \$22.50, would make a sum of \$47.10. The question now is can this Court assume jurisdiction, 1st, to enforce the contract, and 2nd, to allow the wages earned as master.

The only authority under which it can be pretended that this Court has jurisdiction with reference to the agreement, is the Imperial Statute, "The Vice-Admiralty Court Act, 1863," 26 Vict. c. 24, s. 10, sub-sec. 2, by which it is enacted that the matters among others in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows:—"Claims for master's wages, and for his disbursements on account of the ship." By the same statute, the jurisdiction is made to extend to "claims in respect of towage." In a case which came before this Court in 1865 (*British Lion*, 2 S. V. A. R., p. 114), it was said by Mr. Black that he had great doubt as to the power of this Court to enforce an agreement to employ a particular tug, either for a definite or indefinite quantity of work. No doubt the Court can under the statute 26 Vict. c. 24 (the Vice-Admiralty Act, 1863), enforce the payment of reasonable towage, but it does not seem that it has power to enforce an agreement to employ a particular tug either for a definite or an indefinite quantity of work; and Dr. Lushington in the case of the *Martha* (Vernon Lush R. 314. See the *City of Petersburg*, 2 S. V. A. R. 343), held the same opinion under the 3rd and 4th Vict., c. 65, s. 6, giving similar jurisdiction to the High Court of Admiralty. The same reasoning applies, perhaps, with additional force to the agreement now under consideration, upon which remuneration is asked for a sub-agency not incident to the duties of a master of a vessel, but one comprising duties analogous to those of a *commissaire*; and, most assuredly, the terms of the statute, "claims for master's wages," cannot cover those of a runner for a tug boat, or for the miscellaneous offices which the promoter promised to perform. I therefore can exercise no jurisdiction so as to award the \$92, evidently due to the promoter.

The second question, as to the allowance of the \$47.10 due the promoter for wages that have been earned by him as master, is to be determined by the enactments of two statutes, "The Merchant Shipping Act, 1854," ss. 189, 191, and that of the Dominion known as "The Seamen's Act, 1873," 36 Vict. c. 129, ss. 56, 59. By the former, no suit for the recovery of master's wages under the sum of £50 sterling, shall be instituted by or on behalf of a master or seaman in any court of Vice-Admiralty. By the latter, the sum of £50 is reduced to \$200 as respects vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick and British Columbia. The Parliament of the Dominion was vested with exclusive legislative powers in all matters classed under "navigation and shipping," by virtue of the British North America Act, 1867. The Seaman's Act, 1873, was passed by it, and after a reservation for the Royal Assent, it came into force on the 27th March, 1874. By it the 189th and 191st sections of the Merchant Shipping Act, 1854, were so far repealed as to reduce £50 sterling to \$200, as I have said with reference to vessels registered in the four Provinces I have named. The 189th and the 191st sections remained in full force as respects all other vessels which had been made subject to them, and have been invariably carried into effect as respects them. These enactments have had a most salutary effect, and remedied grievances of which the shipping interests had great reason to complain, particularly at this port, where suits without foundation for seamen's wages, the levying of blackmail, and in aid of the crimping business, were continually resorted to. Effect was given to these enactments in the case of the *Margaret Stevenson*, 2 S. V. A. R. 192, determined by this Court in 1873. I observe that this decision has been questioned by a Court which, although it is one of a limited jurisdiction, still as an opinion expressed by it, if correct, would unsettle the law in a most important particular, I shall advert to it: (The tug *Robb*, Mar. Court, Ontario, 17 C. L. J. 67). It is stated that the two sections of the Merchant Shipping Act, 1854 (180th, 191st), are not to be read in connection with the Vice-Admiralty Court Act, 1863, leaving it to be inferred that the latter repealed the former. If such were the case, an efficient safeguard to British shipping frequenting not only this port, but all the ports of Her Majesty's dominions, would be removed.

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RE TUG "ROYAL."

[Vice Adm. Ct.]

The Merchant Shipping Act, 1854, by its two sections limits, except in certain cases, the Vice-Admiralty jurisdiction to master's and seamen's wages to cases over £50 sterling; and because it is said in the Vice-Admiralty Court Act, 1863, while enumerating the cases of jurisdiction, that the Vice-Admiralty Courts shall have jurisdiction in respect of claims for their wages, it repeals by inference or implications these 189th and 191st sections. As no mention of the first statute is made in the second, the latter would rather be confirmatory of it, the affirming of that which existed before. The former statute is not even referred to in the latter. "A later Act of Parliament has never been construed to repeal a prior Act, unless there be a contrariety or repugnancy in them, or at least some notice taken of the former Act, so as to indicate an intention in the law given to repeal it, and the law does not favour a repeal by implication unless the repugnance be quite plain, and a subsequent Act which can be reconciled with a former Act, shall not be a repeal of it: (Dw. on Stat., and cases cited p. 674). Of this supposed, implied, or inferential repeal, a recent writer has taken notice: (Machlachan on Shipping, p. 253. Adverting to the Admiralty Court Act, 1861, 2 S. V. A. R. App. 248; Boyd's Merchant Shipping Laws, pp. 161, 456), in which a like jurisdiction is conferred on the High Court of Admiralty over "any claim" for Masters' wages, provided that if in any such case the plaintiff do not recover £50, he shall not be entitled to costs, he has observed:—"It has been said that this section is repealed by the provision of the Admiralty Court Act, 1861, because the language of it is 'any claim': but whereas the one statute affirmatively gives jurisdiction, and the other negatively, within certain limits, debars the suitor from the Court, there seems to be no contradiction between them, such as would otherwise imply the repeal of the earlier statute." Additional jurisdiction in other matters was to be given by the new Act, and in a list of the whole claims for masters' wages were necessarily repeated, leaving them standing as before. Then there is the Imperial Statute; the Merchant Shipping Act, 1873, the second section of which has enacted, that it is to be construed as one with the Merchant Shipping Act, 1854, and the acts amending the same, which might be cited collectively as the Merchant Shipping Act, 1854 to 1873. The 33rd section repeals several

sections of the Merchant Shipping Act, 1854, but not the 189th or 191st sections, which is evidence that the Legislature did not intend to repeal these sections by the Vice-Admiralty Court Act, 1864, but advisedly left them in full force.

I have, therefore, not the slightest hesitation in deciding that the two sections of the Merchant Shipping Act, 1854, have not been repealed by implication or inference, and that I must give effect to them, except in so far as they have been modified by the Dominion Statute, the Seamen's Act, 1873, with respect to vessels registered in the Provinces referred to; and as the sums earned by the promoter and master's wages do not amount to \$200, I cannot assume jurisdiction so as to award them.

There remain to be disposed of the claims for disbursements. Their amounts have been already stated. The last for \$7 may be discarded, as the promoter does not appear at the time (March, 1872), to have been then employed as master; in fact, the navigation could not then have been open. As respects the remaining three accounts: the first is for firewood sold by one Edouard Alain, on the 29th June, at Batis-can, when the *Royal* was towing a raft, and required fuel; the promoter then gave an order on Burns for the price, \$40.50, payable to *Alain*, and the promoter endorsed it. Alain has testified "that in taking the signature of the promoter on the order, he intended to hold him responsible for the price, if he was not paid by Burns." The suit was brought on the 19th of July, 1882, and the draft was paid by Burns on the 22nd of the same month. The second account is for coal sold at Sorel, by one Ernest Rondeau, the day before the purchase of the firewood; the account was made out against the steamer *Royal* for \$50; at the foot the promoter wrote the word "correct," and signed his name to it. Rondeau at the same time asked the name of the owner, the promoter said Burns, the reply was, "I don't know him; I will give the coal to you, but you must be responsible;" and then the promoter said, "It is all right, if he does not pay you I will." Rondeau being in Quebec on the 15th September last, 1882, Burns paid him the amount. The third account is for work and materials furnished by one Decheneau, at Quebec, to whom the promoter said, "If Burns does not pay you I will." The account was made out on the 22nd July, 1882, and at the expiration of a fortnight Burns paid it.

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RE TUG "ROYAL."—NOTES OF CANADIAN CASES.

[Sup. Ct.]

The respondent has contended that these amounts cannot be recovered because the promoter did not pay them. It was so held by Dr. Lushington: (*The Chieftain*, Br. & Lush. 104 H.; the *Edwin*, 281); but the rule was relaxed by Sir Robert Phillimore, in the case of the *Feronia*, 2 Ad. & E. p. 65, in which he said: "I cannot but think that in this and other cases, referring to Dr. Lushington's decisions, an attempt has been made to strain those judgments beyond what the learned judge intended. My reasons for that opinion were fully stated by me in a recent case, that of the *Red Rose*. I shall allow the items, but I shall accompany them with a recommendation that no order for the payment thereof be made until the master has deposited in the Registry, vouchers for the payment, or given satisfactory evidence that the accounts have been paid. I would readily so decree in this case, if it were not for several obstacles. The evidence establishes that the promoter did not assume a direct liability to pay the accounts, and it was conditional upon the agent of the tug not paying them; and until such time as the respondent, or her agent, was placed *in mora* upon the presentment of the draft and the accounts, and a refusal or neglect to pay established, liability by the promoter could not attach to him. These precautions were not taken, and I think they should have been. But there is another impediment in the way of a judgment in favour of the promoter. In the case of the *Fleur de Lis* it was held that a master suing for wages and disbursements, is bound to furnish accounts before beginning his suit; if he do not, he will not be entitled to his costs. The language of Dr. Lushington in the case is: "The master was bound by practice and justice to furnish accounts before bringing his suit; he might have had the amount claimed without suit; he is therefore not entitled to his costs:" (1 A. & E. 49.) If the accounts sued upon, with the proper vouchers, that is, the accounts which have been referred to, had been presented to the respondent or her agent, Burns, before this suit was brought, and a default to pay the three accounts established, I should have rendered a judgment in favour of the promoter for the amount if not paid, and if paid after action was brought, for the costs. The promoter quarreled with Burns when discharged. He seems to have acted without due premeditation in bringing this suit, a step taken in haste, most unfortu-

nately, to be repented of at leisure, as I find myself compelled to dismiss the case with costs.

Andrews, Caron, Andrews and Pentland, for promoter.

M. A. Hearn, for respondent.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

ELECTION APPEALS.

QUEEN'S COUNTY P. E. I. ELECTION PETITION.

[March Session, 1883.]

JENKINS V. BRECKEN.

Election Petition—Ballots—Secreting—37 Vict. ch. 9, ss. 43, 45, 55 and 80—41 Vict. ch. 6, ss. 5, 6 and 10—Effect of neglect of duty by a deputy returning officer—37 Vict. ch. 10, ss. 64 and 65—Recriminatory case.

In ballot papers containing the names of four candidates, the following ballots were held valid:—

(1) Ballots containing two crosses, one on the line above the first name, and one on the line above second name, valid for the first two named candidates.

(2) Ballots containing two crosses, one on the line above the first name, and one on the line dividing the second and third compartments, valid for the first named candidate.

(3) Ballots containing properly made crosses in two of the compartments of the ballot paper, with a slight lead pencil stroke in another compartment.

(4) Ballots marked in the proper compartment, thus: Y

The following ballots were held invalid:—

(1) Ballots with a cross in the right place on the back of the ballot paper, instead of on the printed side.

(2) Ballots marked with an x instead of a cross.

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On a recount before the County Court Judge, the appellant, who had a minority of votes according to the return of the Returning Officer, was declared elected, all the ballots cast at three polling districts (in which the appellant had polled 331 votes, and the respondent 345), having been struck out, on the ground that the Deputy Returning Officer had neglected to place his initials upon the back of the ballot.

On appeal to the Supreme Court of P. E. Island, it was proved that the Deputy Returning Officer had placed his initials on the counterfoil before giving the ballot paper to the voter, and afterwards, previous to his putting the ballots in the ballot box, had detached and destroyed the counterfoil, and that the ballots used were the same as those he had supplied to the voters, and Mr. Justice PETERS held that the ballots of the said three polls ought to be counted, and did count them.

Thereupon J., appealed to the Supreme Court of Canada, and it was

Held [affirming the judgment of Mr. Justice PETERS], that in the present case the Deputy Returning Officers having had the means of identifying the ballot papers as being those supplied by them to the voters, and the neglect of the Deputy Returning Officer to put their initials on the back of these ballot papers, not having affected the result of the election, or caused substantial injustice, did not invalidate the election. The decision in the *Monck* election case (Hodgins Elec. Cases, p. 725), commented on and approved of.

In this case, the appellant, claimed under sec. 66 of 37 Vict., ch. 10, that if he was not entitled to the seat, the election should be declared void, on the ground of irregularities in the conduct of the election generally, and filed no counter-petition, and did not otherwise comply with the provisions of 37 Vict. ch. 10, the Dominion Controverted Elections Act.

Held, that section 66 of 37 Vict. ch. 10, only applies to cases of recriminatory charges, and not to a case where neither of the parties or their agents are charged with doing any wrongful act.

Quare, whether the County Judge can object to the validity of a ballot paper, when no objection had been made to the same by the candidate or his agent, or an elector, in accordance with the provisions of sect. 56, 37 Vict. ch. 10, at

the time of the counting of the votes by the Deputy Returning Officer.

Appeal dismissed with costs.

Hector Cameron, Q.C., for appellant.

Lash, Q.C., for respondent.

DICKIE V. WOODWORTH.

Election petition—Rule or order under 37 Vict. ch. 10, sec. 9, non appealable—42 Vict. ch. 39, sec. 10.

On August 16th, 1882, upon the *ex parte* application of the solicitor for petitioner, RIGBY, J., granted an order extending for twenty days the time for the service of the petition, and of the notice of presentation thereof, and of the security having been deposited, and the copy of the receipt for said security.

On the 25th August, 1882, the respondent obtained from RIGBY, J., a rule *nisi* to set aside the order of the 16th August.

On the 27th September, 1882, this rule *nisi* was made absolute, with costs, on the ground that the order of the 16th August was improvidently granted, and without sufficient cause shown.

On the 30th September, 1882, on the application of the petitioner, supported by affidavits, RIGBY, J., made another order extending to the 15th October then next, the time for service of notice of presentation of petition, and of security, with a copy of petition.

On the 16th of October, 1882, RIGBY, J., granted a rule *nisi* (returnable before the Supreme Court at Halifax), to set aside the petition, the presentation thereof, the order made on the 30th September, preceding the service of petition, etc., and all further proceedings.

On the 15th January, 1883, this rule *nisi* was made absolute, without costs, by the Supreme Court of Nova Scotia, on the principal ground that the affidavits on which the *ex parte* order of the 30th September was granted, disclosed no facts unknown to petitioner, when the order of 16th August was obtained. The petitioner thereupon appealed to the Supreme Court of Canada.

Held, [FOURNIER and HENRY, JJ., dissenting], that the rule appealed from was not a judgment, rule or order, or decision from which

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an appeal would lie, under sec. 10 of the Supreme Court Amendment Act of 1879.

Appeal quashed with costs.

H. McD. Henry, Q.C., for appellant.

Hector Cameron, Q.C., for respondent.

COURT OF APPEAL.

From C. P.]

[March 24.]

QUINLAN V. THE UNION FIRE INSURANCE CO.

Interest given on appeal.

The 43rd section of the Court of Appeal Act, which enables the Court "when on an appeal against a judgment in any action personal, the Court of Appeal gives judgment for the respondent, interest shall be allowed by the Court for such time as execution has been delayed by the appeal," does not apply to a case where the judgment of the Court below is in favour of the defendant, and which is reversed on appeal. In such case the Court in reversing the judgment, gave liberty to the appellant, the plaintiff in the Court below, to move to be at liberty to enter judgment as directed by this Court, *nunc pro tunc*, whereby he would be entitled to recover interest on the amount of the verdict rendered in his favour.

When upon the argument of an appeal, the respondent omitted to point out in what respect the replications of the plaintiff were demurrable, the Court refused to wade through the mass of pleading which had been filed in the Court below, to find it out for themselves; and being of opinion, in the absence of argument, that the pleading was good, affirmed the judgment of the Court below upon such pleading.

The unnecessary and improper length of pleadings remarked upon.

Bethune, Q.C., and J. B. Dixon, for the appeal.

McCarthy, Q.C., and A. C. Galt, contra.

From C. C. Hastings.]

DUNFORD V. DUNFORD.

Interpleader—Sale of chattels - Change of possession.

G. had recovered a judgment against his father for costs in an action instituted by the latter, and

upon the execution issued thereon, seized a horse as the property of the father in the possession of the plaintiff A., another son. It was shown that several years before, the father had agreed to convey his farm to A. and another brother W., both of whom assumed possession and control of the property before any conveyance was executed, and so continued in possession, the father continuing to reside on the place with the two sons, part of the consideration for the conveyance being that they should support him. The sons also bought the chattel property from their father, the horse in question having been purchased by A. for \$50, and which he kept upon the premises, as he had always done, using him in the work of the farm, and occasionally working for others with him for hire, the father sometimes using him for his own purposes. On this state of facts, the Judge of the County Court of Hastings in an interpleader issue, left the question of property to the jury, who on being polled, found a verdict for A. The Court being of opinion that the claim of G. having arisen long after the alleged sale of the chattels, it would require a preponderance of evidence in favor of G., to induce the Court to interfere with the finding of the jury (but which did not exist), refused to disturb the conclusion of the judge as to the finding of the jury, and dismissed an appeal with costs.

J. K. Kerr, Q.C., and Skinner, for the appeal.
Clute, contra.

From Q. B.]

IN RE HIGH SCHOOL BOARD OF DISTRICT NO. 4 OF STORMONT, DUNDAS AND GLENGARRY AND TOWNSHIP OF WINCHESTER.

High school district—Separation of part—Liability to contribute—Money demanded before separation.

The decision of the Court of Queen's Bench (45 U. C. R. 460), reversed on appeal.

Bethune, Q.C., for appeal.

McCarthy, Q.C., contra.

From Q. B.]

MAW V. TOWNSHIPS OF KING AND ALBION.

Negligence—Contributory negligence.

A portion of a highway which the defendants were bound to keep in repair had a trench running across it caused by water escaping from a

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culvert, and was allowed so to continue out of repair for a month. The deceased while lawfully travelling along the road, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased at the time of the accident was intoxicated, and thus contributed to the accident. The judge before whom the action was tried, left it to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favour of the plaintiff.

Held, [affirming the decision of the Court of Q. B., who refused a rule *nisi* to enter a nonsuit], that the question of contributory negligence was one proper to be left to the jury.

C. Robinson, Q.C., and Shepley, for appeal.

G. H. Watson, contra.

From Q. B.]

MURRAY v. MCCALLUM.

Married Woman's Act—Separate property—Separate trading.

In order that the property of a married woman, who carries on a business for herself may be protected from executions against her husband, it is not necessary that she should live separate and apart from her husband, or that the business should be carried on in a house other than that in which the husband and his wife reside.

The plaintiff who was possessed of a sum of money (about \$300), felt dissatisfied with her husband's management of his business, his goods having been sold under execution for debt whilst residing on a rented farm, the sale not realizing sufficient to pay the arrears of rent and his debts; leaving, in fact, unpaid the debt for which the defendant in the present action had obtained execution. The husband had literally no means, and the plaintiff resolved to start hotel keeping, and agreed to give her husband \$15 a month for his services as bar-keeper, the duties of which he discharged, and lived with her in the hotel. It was shown by the evidence, that whilst thus engaged, she had had two partners in carrying on the hotel business. The defendant seized the goods in the hotel,

and in an interpleader issue, a verdict was rendered in favour of the plaintiff, which the Court in banco refused to set aside. On appeal to this Court,

Held [per SPRAGGE, C.J., and CAMERON, J.], that the facts showed the plaintiff to have had a separate trade within the Act, the husband not having the control of the business, but being hired for a particular duty.

Per BURTON, J. A.—It was not intended that there should be an inquiry under the Act as to the *bona fides* of such transactions; but that the fact of the husband's interference with the concurrence of the wife, deprived it at once of its separate character.

Per BURTON and PATTERSON, JJ.A.—That the interference of the husband with the business, as shown by the evidence, was such in reality as to prevent its being treated as the separate business of the plaintiff.

McCarthy, Q.C., and Laidlaw, for the appeal.
Bethune, Q.C., and Morrison, contra.

From C. P.]

HALE v. KENNEDY.

Appeal—Practice.

The Judge at *nisi prius* found a verdict in favor of the defendants, which the Divisional Court of the Common Pleas Division, in banco, reversed, and either determination was supported by the evidence according to the manner in which the facts were viewed and treated. This Court therefore refused to reverse the judgment of the Divisional Court, as it could not be said with certainty that it was wrong.

C. Robinson, Q.C., and Burrit, for the appeal.
Bethune, Q.C., and Deacon, Q.C., contra.

From C. P.]

OLIVER v. NEWHOUSE.

Landlord and tenant—Execution—Chattel Mortgage.

An appeal from the judgment of the Common Pleas (32 C. P. 91), allowed.

Per SPRAGGE, C. J.—That there was nothing upon which an execution against the goods of the son could operate from the time the tenancy was concluded; and that the Chattel Mortgage

Act could not apply, as there was not any sale by the son to his father, the goods reverting to the father when the tenancy ceased. But if it was a seal, there was an immediate delivery, and an actual and continued change of possession within the words of the statute.

McCarthy, Q.C., and *Milligan*, for appeal.
C. Robinson, Q.C., and *McFadden*, contra.

From C. P.]

SILBY V. DUNNVILLE.

Municipal corporation—Contract not under seal.

The judgment of the Court of Common Pleas (31 C. P. 301), affirmed on appeal.

McCarthy, Q.C., and *Nesbitt*, for the appellant.

Bethune, Q.C., and *Bruce*, for the respondent.

COMMON PLEAS DIVISION.

Osler, J.]

LEITCH V. MCLELLAN.

Dower—Life estate—Husband and wife—Estate by entirety—Survivorship—Right to set up breach of covenant.

Where a husband died entitled to the reversion in fee in certain lands expectant on a life estate therein,

Held, that dower could not be claimed thereout, in that the husband had never been seized during coverture of inheritance or possession.

A lease for life to a husband and wife makes them tenants of the entirety, so that the whole accrues to the survivor.

The demandant who was a stranger to the estate, was held not entitled to set up that there had been a forfeiture of the life lease by non-payment or other breach of covenant.

Jacobs, for the demandant.

Guthrie, Q.C., and *Watt*, for the defendant.

CHANCERY DIVISION.

Proudfoot, J.]

[April 11.]

MCCLLENAGHAN V. GREY.

Demurrer—Temporalities Act—Demurrer for want of parties—Rule 189.

Demurrer. The action was brought by M. and H., wardens of St. Paul's Church, at Woodstock, on behalf of themselves and all the other members of the congregation of the said church, against the defendants, the executors of one W.

The statement of claim stated the will of W., made April, 1876, appointing the defendants her executors, and giving and bequeathing unto the incumbent of St. Paul's Church, for the time being, certain funds to be used for the use and relief of the poor of the said church, to be dispensed by the said incumbent. It then alleged that the defendants refused to permit the incumbent to dispense the funds, and were misapplying them; and claimed to have the estate administered, and to have a declaration that the incumbent was entitled to distribute the funds.

The defendant demurred on the grounds (i.) that the defendants had no title to maintain the action; (ii.) that the proper person to require the defendants to account was the incumbent, and no reason was shown why he was not a party.

Demurrer allowed for:—

(i.) Even if the incumbent was a member of the congregation, in whose behalf the plaintiff sued, which could not be assumed, yet the bequest was not to the congregation, but to the incumbent, whose position was certainly different to that of the churchwardens and the other members of the congregation.

(ii.) The Temporalities Act did not empower the churchwardens to sue for a bequest such as this, which was not to the church generally, but only to a particular class—the poor of the church.

(iii.) This was not to be, considered properly, a demurrer for want of parties. It was a demurrer for a matter of substance—that the plaintiffs had no right of action.

Clowes v. Hilliard, L. R. 4 Ch. D. 413; and *New Westminster Brewing Co. v. Hannah*, 24 W. R. 899, followed; *Werderman v. Societe Generale D'electricite*, L. R. 19 Ch. D. 246, distinguished.

C. Moss, Q.C., for the demurrer.

S. H. Blake, Q.C., contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac. Cases.

Boyd, C.]

[April 25.]

SMITH V. THE MIDLAND RY. CO.

Sale of railway lands for taxes—Statute of Limitations in regard to tax sales—Validity of tax sale—R. S. O. c. 18, ss. 105, 141, 109, 110, 115.

The lands of railways may be sold for taxes. Under the Assessment Act, R. S. O. c. 180, sect. 105, accrued taxes are made a special lien on the land, having preference over any claim, lien, privilege, or encumbrance of any party except the Crown, and in view of the English decisions there is no impropriety in giving effect to the statutory lien for unpaid taxes, by means of a sale of the land.

The Statute of Limitations does not begin to run against a tax purchaser until the period for redemption has expired. There is a qualified ownership during the year for redemption, to protect the property from spoliation and waste, under R. S. O. c. 180, s. 141, but the estate is not vested in the purchaser till the execution of the deed.

It appears to be the intention of the Assessment Act not to vitiate a tax sale on account of the default of subordinate officers in observing statutory requirements. Therefore, where it appeared that, as far as the county treasurer was concerned, all the steps taken by him in regard to the sale of certain lands for taxes, were regular, and authorized by R. S. O. 180, although it was not clear, on the evidence, whether the county clerk and the assessor had or had not properly complied with the requirements of ss. 109 and 110 of the said Act, but it appeared that the sale had taken place for taxes actually in arrear for the required length of time, followed by a tax deed thereafter, which had not been questioned within two years.

Held, the sale and deed were not afterwards impeachable for the default (if there was default) of the subordinate local officers in carrying out the special provisions of the said Act.

Sect. 115 of the said R. S. O. c. 180, imposing penalties upon defaulting clerks and assessors who fail to carry out the statutory directions regarding the list of lands liable to be sold, affords suggestive evidence that this is the remedy intended by the legislature, and not the avoiding

of the tax sale and deed, at all events, after the two years. (See sect. 131).

Ferguson, J.]

[April 26.]

MERCHANTS BANK V. MOFFATT.

Deeds executed under mistake.

Where it appeared that the defendant, a man of education and well acquainted with commercial business, had executed a certain agreement and bond to pay certain sums of money in certain events, to the plaintiffs; that this agreement and bond had been executed by him under a misunderstanding as to their effect, and relying on misrepresentations made to him as to this, not by the plaintiffs, but by one of those who had joined with him in executing the said document, and without having read over the said documents, or taken any legal advice hereon; but that the plaintiffs had not, either by themselves or any agent, made any representations to the defendant as to the effect or contents of the said documents.

Held, after a review of the authorities, the defendant was bound by the said documents according to their tenor and purport.

C. Robinson, Q.C., and J. Smith, for the plaintiffs.

D. McCarthy, Q.C., and Ferguson, for the defendants.

PRACTICE CASES.

Osler, J.]

[Jan. 3.]

MAITLAND V. GLOBE PRINTING CO.

Examination—Corporate company—Officer of—R. S. O. ch. 50.

Held, that the sub-editor or assistant editor of the defendants was an officer of the Company examinable for the purpose of discovery, under R. S. O. ch. 50, sec. —.

C. Millar, for the plaintiff.

Aylesworth, for the defendants.

Proudfoot, J.]

[April 9.

GAGE V. CANADA PUBLISHING CO.

Tariff—Taxable costs.

Appeal by the plaintiff from the ruling of one of the taxing officers on four points :—

1. That charges should have been allowed for obtaining copies of shorthand evidence for use at the argument which took place, owing to an unavoidable postponement, three months after the examination of the greater portion of the witnesses.

2. That \$1.00 instead of 50 cents should have been allowed for the copy of the writ of summons deposited with the clerk who issued the writ.

3. That a fee of \$1.00 should have been allowed on all præcipe orders.

4. That a fee of \$2.00 should have been allowed to counsel for attending to read the written judgment handed out by the Judge and not delivered in open Court.

Held (after consultation with BOYD, C.), the appeal should be allowed on all four points.

S. H. Blake, Q.C., for the appeal.

W. Davidson and W. Barwick, contra.

Hagarty, C.J.]

[April 11.

KING V. MOYER.

Taxation of costs—Action by solicitor—Taxable fees—Agency.

The plaintiff as solicitor obtained a verdict for damages and costs in an action for libel in which although another solicitor appeared as acting for him in all the pleadings and proceedings in the suit, he actually did the work and carried on the suit himself. Full fees, except instruction, were allowed him on taxation. On appeal, HAGARTY, C.J., upheld the taxing officer's ruling.

Clement, for the appeal.

Aylesworth, contra.

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FLOTSAM AND JETSAM.

BARON MARTIN.—The following stories of Baron Martin have been sent to us : On his last circuit in Kent, he tried an action for breach of promise of marriage. The pleadings having been opened, and the leading counsel having addressed the jury, the junior counsel proceeded to examine the plaintiff : "When did you make the defendant's acquaintance?" "Was he introduced to your family?" and so on. The baron waited a few minutes without taking a note, and, probably guessing, rather than hearing, the usual introductory questions and answers which were proceeding, at length broke in thus : "Well, well, Mr. S. ! I dare say all your questions are very proper ; but listen to me young woman. Now, did this young man promise to marry you?" "Yes, my lord, he

did." "Has he married you?" "No, my lord, he has not." "Has he refused to marry you?" "Yes, my lord, he has." "There, Mr. S. !" addressing the counsel, "what do you want more? that is your case, is it not?" It was the case ; and, on the strength of it, and the baron's address to the jury, the plaintiff obtained a good verdict. On his last circuit at Lewes, a man who had been a partner in a firm at Brighton had been committed for trial for stealing partnership money. In charging the grand jury, the baron told them to throw out the bill ; "for," said he, "who ever heard of a man stealing his own money. It cannot be, gentlemen." The clerk of arraigns rose to show the judge the Act of Parliament, which make the stealing of partnership money a felony. "Never mind the Act of Parliament, Mr Avory, take it away—take it away—whoever drew that Act knew nothing whatever about the law !" Another correspondent recalls an incident, in a case tried at Guildhall, in which Chief Baron Pollock was the judge, Mr. Martin counsel for the Crown, and Sir Frederick Thesiger for the defendant. In the course of the case Sir F. Thesiger rose and, with great warmth, declared that it was impossible for counsel to do his duty fairly to his client when in that Court and opposed to Mr. Martin. The incident did not disturb the harmony of the relations between Martin and Thesiger.—*Law Journal*.

JUSTICE EAST AND WEST.—"I hate to live in a new country," said Jones, "where there is no law." "Yer betyer," chimed in Thompson. "Law is the only thing that keeps us out of everlasting chaos." "Yes, indeed," said a legal gentleman present. "It is the bulwark of the poor man's liberty, the shield which the strong arm of justice throws over the weak, the solace and the balsam of the unfortunate and wronged, the—" "Oh, stop'er," remarked the man with one eye. "I won't have it that way. Law is a boss invention for rascals of all grades. Give me a country where there is no law, and I can take care of myself every time. Now, for instance, when I lived in Ohio I got a dose of law that I will never forget. I was in partnership with a man named Butler, and one morning we found our cashier missing with \$3,000. He had dragged the safe and put out. Well, I started after him and caught him in Chicago, where he was splurging around on the money. I got him arrested, and there was an examination. Well, all the facts were brought out, and the defence moved that the case be dismissed, as the prosecution did not make out a case in the name of the firm, and that if there was a firm the co-partnership had not been shown by any evidence before the court. To my astonishment the court said the plea was O.K., and dismissed the case. Before I could realise what was up the thief had walked off. Well, I followed him to St. Louis, and there I tackled him again. I sent for my

FLOTSAM AND JETSAM.

partner, and we made a complete case, going for him in the name of the Commonwealth and Smith, Butler & Co. Well, the lawyer for the defence claimed that the money being taken from a private drawer in the safe, was my money exclusively, and that my partner had nothing to do with it; that the case should be prosecuted by me individually, and not by the firm. The old bloke who sat on the bench wiped his spectacles, grunted around awhile, and dismissed the case. Away goes the man again. Then I got another hitch on him, and tried to convict him of theft, but the court held that he should be charged with embezzlement. Some years after that I tackled him again, and they let him go. Statutes of limitation, you see. Well, I concluded to give it up, and I did. But just about four years afterwards, I was down to Colorado, and a man pointed to another and said: 'That fellow has just made a hundred thousand in a mining swindle.' I looked, and it was my old cashier. I followed him to the hotel, and nailed him in his room with the money. 'Now,' I says, 'Billy, do you recognise your old boss?' and of course he did. Says I, 'Bill, I want that three thousand you stole from me, with the interest and all legal and travelling expenses.' 'Ah! you do,' says he. 'Didn't the courts decide that—' 'Curse the courts,' says I, putting a six-shooter a foot long under his nose. 'This is the sort of a legal document that I'm travellin' on now. This is the complaint, warrant, indictment, judge, jury, verdict, and sentence all combined, and the firm of Colt & Co., New Haven, are my attorneys in this case. When they speak they talk straight to the point of your mug, you bloody larceny thief. The jury of six, of which I am foreman, is liable to be discharged at any moment. No technicality or statute of limitations here, and a stay of proceedings won't last over four seconds; I wan \$10,000 to square my bill, or I'll blow your blasted brains out.' Well, he passed over the money right away, and said he hoped ther'd be no hard feelings. Now, there's some Colorado law for you, and it's the kind for me? Eh, boys? And the crowd with one accord, concurred in the cheapness and efficacy of the plan by which a man can carry his court on his hip, instead of appealing to the blind goddess in Chicago and St. Louis.—*Burlington Hawkeye*.

THE CRIMINAL APPEAL BILL.—In charging the grand jury at the Kent and Sussex assizes, Mr. Justice Williams said that it was a proposal which would create a real revolution in the administration of the criminal law of the country. It would give a general appeal on matters of law and matters of fact in criminal cases; and, speaking for himself, it seemed to him that the time had arrived when a change in this direction had become inevitable. He regretted that a distinction should be made in the case of murder. There was no doubt a reason for it, but he be-

lieved miscarriage more likely to occur in almost every other case than in murder, and in some almost as serious. He was unable to understand why in the case of murder there should be an absolute right of appeal, and that in all other cases an appeal should be subject to the laws of the tribunal before whom the criminal was tried; but he believed that this would only be temporary, as when once the law was changed this must inevitably follow. He also regretted that there should not be an appeal against sentences, and he should have been glad to see a central authority established to lay down rules and privileges for the guidance of individual judges in these matters.—*Law Journal*.

NOTES OF CASES IN PROVINCE OF QUEBEC—SUPERIOR COURT, MONTREAL.

(From *Legal News*.)

LE PRINCIPAL DE L'ÉCOLE NORMALE JACQUES-CARTIER V. POISSANT.

Normal School—Pupil—Penalty for refusal to teach.

The father of a pupil of the Jacques-Cartier Normal School will not be liable to repay the amount of a bursary granted to his son, unless it be shown that the son was put in default and refused to teach.

CORCORAN V. THE MONTREAL ABATTOIR COMPANY.

Obligation with a term—Insolvency—C. C. 1092.

Held, that a company ceasing to meet its ordinary payments as they become due, though its nominal assets may be equal to its liabilities, will be deemed insolvent; and cannot claim the benefit of the term upon a promissory note not yet due.

DICKISON V. NORMANDEAU.

Promissory note—Insufficient stamps—Effect of the Act repealing the Stamp Acts.

The right of the holder in good faith to apply to the Court for leave to affix the required amount of stamps to a note on which suit is pending, is not affected (as to a note made before the repeal of the duty) by the Act 45 Vict. c. 1, repealing the Stamp duties.

We are indebted to the courtesy of the compiler for a copy of an Index to the treaties, agreements, Imperial despatches and Orders-in-Council, and proclamations, regulations and Orders-in-Council of the Government of Canada, prepared according to the order of the House of Commons, by Messrs. F. B. Hayes and R. J. Wicksteed, Law Department,

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely :—

William Renwick Riddell, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson. John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robl, Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University or Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From 1882 to 1885. { Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History Queen Anne to George III.
Modern Geography, N. America and Europe.
Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cæsar, Bellum Britannicum.
Cicero, Pro Archia.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Heroides, Epistles, V. XIII.
Cicero, Cato Major.
1884. { Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Xenophon, Anabasis, B. V.
1885. { Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations ; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.
Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

LAW SOCIETY.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1883 { Emile de Bonnechose, 1884 { Souvestre, Un
1885 { Lazare Hoche. 1884 { philosophe
sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

William's Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.

Easter Term, third Monday in May.

Trinity Term, first Monday after 21st August.

Michaelmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

The First Intermediate Examination will begin on the second Tuesday before Term at 9 a.m.

The Second Intermediate Examination will begin on the second Thursday before Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Benchers during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees.....	\$ 1 00
Student's Admission Fee.....	50 00
Articled Clerk's Fee.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " ".....	100 00
Intermediate Fee.....	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions.....	2 00
" Diplomas.....	2 00
" Certificate of Admission.....	1 00
All other Certificates.....	1 00

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NO. 10.

DIARY FOR MAY.

- 16. Wed.... Examination for Call.
- 18. Fri.... D. A. Macdonald, Lieut.-Governor, Ontario, 1875.
- 20. Sun.... *Trinity Sunday*
- 21. Mon.... Easter sabb. begin. Confederation of B. N. A. Provinces proclaimed, 1867.
- 22. Tues... Earl Dufferin Gov.-Gen., 1872.
- 24. Thurs.. Queen's Birthday, 1819. Ferguson, V.C., appointed 1881.
- 25. Fri.... Princess Helena born, 1846.
- 27. Sun.... *First Sunday after Trinity.*
- 29. Tues... Battle of Sackett's Harbour, 1813.
- 30. Wed.... Proudfoot, V.C., appointed 1874.

TORONTO, MAY 15, 1883.

WE copy from the *Philadelphia Legal Intelligencer*, a report of the judgment on the demurrer to the indictment in the Phipps' Extradition Case. In the judgment in the Court of Appeal, Mr. Justice Patterson expressed an opinion that the indictment did not charge the crime of forgery, but merely a misdemeanor under the statute, and this point was much relied on by defendant's counsel in the argument, though the case did not eventually turn on this view. The Philadelphia Court holds the offence was forgery in whatever form the indictment might be. We understand that though the offence was tried in the Court of Sessions, Judge Allison is really Judge of the higher Court, and would rank with the Judges of our Court of Queen's Bench or Common Pleas here.

LAWYERS, though they have sharp passages on behalf of clients, do not often come personally to such close quarters as have Mr. Marsh and Mr. Titus, whose correspondence in reference to the Wright case is given in full in another place.

It will be remembered that Miss Wright, some time ago, shot a young man named Ryan, whom she supposed was on her premises for no good purpose. She was found guilty, but afterwards pardoned. She was defended by a Mr. Titus, to whom, it is said, she gave, at his request, \$200 to buy up the jury, as well as other money for her defence. How this was, or why the jury, if bought, did not "stay bought," we know not, but through Mr. Marsh an order was made for the taxation of Mr. Titus' bill, and overcharges to the extent of \$173 were ordered to be refunded by the latter to Miss Wright. Mr. Titus, subsequently to his defending Miss Wright against the prosecution instituted by the Ryan family, accepted a retainer from the latter to sue Miss Wright in a civil action for the killing of the deceased. The action was brought in the name of the father, but the instructions came from a brother-in-law of the deceased, not from the father. The release spoken of in the letter of the 18th April referred to a proposed release of any cause of action accruing to the Ryans by reason of the killing above referred to. Based on these letters of Mr. Marsh, and under 32-33 Vict. cap. 21, sect. 43, Mr. Titus laid an information against him, and had him arrested and brought before a Bench of Magistrates at Brighton, when he was committed for trial. We judge from an expression in the letter of 24th April that Mr. Marsh believed that Mr. Titus was using knowledge acquired from Miss Wright in professional confidence as a means of stirring up litigation against a former client. If this were so the threat of striking Mr. Titus off the roll would not seem at all inappropriate, and if it is true that the same gentleman got money from his client to buy up the jury, a more severe

EDITORIAL ITEMS—JUDICIAL SALARIES.

punishment would not be out of place. Certainly the person who would act for the Ryans against Miss Wright, having previously defended her on the charge in relation to which the civil suit was brought, might expect a suspicion to rest on his *bona fides* even though there may be no *lex scripta* forbidding him so to act. If it is incumbent upon Mr. Titus to see that the law is vindicated, as to this alleged demand, with menaces, it is quite as necessary that his conduct should be enquired into by the Law Society, and if he is found to come within the statute in such case made and provided, prompt action should be taken to purge the roll. As to the charge now pending we fail to see at present how the case can be said to come within the criminal law. Mr. Marsh's letters were evidently hastily written, and perhaps indiscreet, and, so far as one can see, beyond his instructions; but that is a very different matter from saying that there was a "demand with menaces of a valuable security, or other valuable thing." One could easily suggest a number of points, some technical and some substantial, which would upset the magisterial apple cart that carries this charge into the judicial presence, but as it is now on the road there we leave it for the present.

JUDICIAL SALARIES.

Sir John Macdonald has given notice of the following resolutions:—"That it is expedient to provide (1) That the salary of the additional judges of the Court of Appeal for Ontario for whose appointment provision is made by an Act of the Legislature of that Province (46 Vict. cap 6,) shall be \$5,000 per annum; (2) That if the Chief Justice of the Queen's Bench, the Chancellor of Ontario, or the Chief Justice of the Common Pleas, is appointed to the Court of Appeal for Ontario, the Governor-in-Council may direct that he be paid a salary not less than that he pre-

viously enjoyed as such Chief Justice or Chancellor; (3) That the third section (respecting retiring allowances to judges) of the Act 31 Vict. cap. 33, shall extend and apply to the judges of the Supreme Court of Judicature of Ontario, and of the Supreme Court of Judicature of Prince Edward Island; (4) That the salaries of the judges of the Superior Court for the Province of Quebec shall be as follows:—The Chief Justice of the said Court, \$6,000; eleven puisne judges of the said Court, whose residences are fixed at Montreal or Quebec, each \$5,000; thirteen puisne judges of the said Court, whose residences are fixed within districts other than Bonaventure and Gaspé or Saguenay, each \$4,000; and two puisne judges of the said Court, whose residences are fixed within the districts of Bonaventure and Gaspé or Saguenay, each \$3,500; (5) That the salary of the County Court judge of the eastern judicial district of Manitoba shall be \$2,000 per annum for his first three years of service, and \$2,500 per annum after such three years' service; and that he shall be paid such travelling allowances as the Governor-in-Council may from time to time determine; (6) That the salaries and allowances mentioned in the preceding resolutions, 1, 3, 4, and 5, shall take effect on and after the next, and shall be computed and payable in the manner provided by the 2nd section of the said Act 31 Vict. cap. 33, without an annual vote of Parliament, as shall also the salary of the Chief Justice or Chancellor of Ontario mentioned in the 2nd resolution; (7) That from and after the 1st day of July in the present year (1883) no travelling or circuit allowances shall be paid to the judges of the Court of Appeal for Ontario."

The time has gone by when the Government can command, or expect to get the best talent at the Bar for the Bench. We do not say that good men are not appointed, but to those who are in the front rank, neither is the honour of the position sufficient inducement for them to leave the Bar, nor can they well

JUDICIAL SALARIES—BLASPHEMY AND BLASPHEMOUS LIBELS.

afford to give up their large incomes for the miserable salaries which would be payable to them as Judges. This is a great evil, and a growing one.

Taking the ground we do, we have no fault to find with the proposed increase to the salaries of the Judges in the Province of Quebec, but are bound to remark that this only makes more striking the inadequate remuneration given to the Judges in this Province. The position and responsibility of a Judge of the Superior Court of Quebec, residing outside of the Cities of Quebec and Montreal, are more nearly represented in Ontario by those of our County Judges than of the Judges of the High Court of Justice, except that these Quebec Judges have, as a rule, vastly less work to do than most of our County Judges; they are to receive, however, \$4,000 per annum (with two exceptions), whilst the annual income of the County Judges in Ontario is only about \$2,500 each. In fact, taking the relative expense of living into consideration, the former are paid sums which are practically much larger than those given to even the Judges of the High Court of Justice in Ontario, living in Toronto. If it is right to make the increase in one Province, it is right in the other. The increase, in truth, should, in all fairness, have begun in Ontario. The volume of judicial business is vastly greater in this Province, and the expense of conducting it, (to the general exchequer) is very much less in proportion to the amount of litigation.

As to the last resolution, which takes away travelling and circuit allowances from the Judges of the Court of Appeal, we presume it is thought that they have enough work to do in Toronto in their proper sphere, and this is probably the case. But the result is a very considerable reduction in their emoluments, as there is a surplus to them on each assize after paying expenses. This reduction is not only unfair, but in the face of the increased cost of living over what it was when Judges' salaries were originally fixed, is

positively cruel. The Judges appointed since shortly after the elevation of Mr. Osler to the Bench, do not receive the \$1,000 which was formerly added to the salaries of the Judges by the Ontario Government for work in connection with the Heir and Devisee Commission, and private bill legislation. There has been a reduction on all sides in this Province, instead of an increase, as there should have been. We believe that if this matter were properly brought before the intelligent public of Ontario, they would see the necessity of making the Bench a prize to the best men at the Bar. Once let the Bench fall in public estimation, and an enormous evil is done. If it is not constitutionally proper for the Provincial Government to supplement the salaries of the Judges, it surely could be done by some arrangement with the Dominion Government. In fact we have an impression that something of this sort was at one time suggested, but not carried out.

SELECTIONS.

BLASPHEMY AND BLASPHEMOUS LIBELS.

The case of *Reg. v. Bradlaugh*, for the publication of a blasphemous libel in the *Freethinker*, absolutely bristled with points of law. The Bankers' Books Evidence Act, 1879, the Evidence Further Amendment Act, 1869, and Lord Campbell's Act, and the law of blasphemous libel, all came under discussion in the course of the case, or of the Lord Chief Justice's summing-up. As to the first Lord Coleridge seemed to have been under some misapprehension. The Act complained of by Mr. Bradlaugh on the part of the prosecution in obtaining an order from the Lord Mayor for the inspection of his banker's books was not taken under the 6th section of the Act of 1869, but under the 7th. The order was not made to compel the banker to produce the books in court, which can only be done by a judge, but to allow the other side to inspect and take copies of any entry therein. The wording of the section allows

BLASPHEMY AND BLASPHEMOUS LIBELS.

"a court or judge to order" such inspection "on the application of any party to a legal proceeding." Court is defined to be the "court, judge, arbitrator, persons or person before whom any legal proceeding is held or taken," and "legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitrator." In correction of our remarks last week, we say, therefore, that it obviously includes the Lord Mayor, sitting as a magistrate, and even the petty sessions' magistrates, against whose power to order an inspection of his banker's book the Chief Justice expressed so much horror.

The Evidence Further Amendment Act, 1869, sect. 4, was brought under notice by one of the witnesses for the defence claiming to affirm on the strength of his statement that he was an Atheist. Mr. Bradlaugh said that it had been so decided, but the decision was not reported. The Chief Justice refused to allow him to affirm until he had stated that he was "a person on whose conscience an oath had no binding effect;" but upon the witness saying that "the oath had no binding effect on his conscience *per se* as an invocation," he permitted him to make the "solemn promise and declaration" prescribed by the Act. It is probable that the mere assertion of entertaining atheistic opinions is sufficient to enable a witness to affirm under the Act instead of taking an oath, as the words are more general than those used in the previous Act of 1861, under which the witness had to assert as part of his affirmation that "the taking of any oath, according to his religious belief, was unlawful." Under the present Act he has only to "object to take oath, or be objected to as incompetent to take an oath." But an Atheist is incompetent to take an oath, because, as Lord Chief Justice Willes said, in *Omichund v. Barker*, "Such infidels, if any such there be, who do not believe in a God . . . cannot be witnesses in any case, or under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them;" and therefore, if he objects to take an oath, the judge ought upon that statement to be satisfied that an oath is not binding upon his conscience, and to admit him to promise under the Act. Lord Coleridge, in his summing-up to the jury, maintained the statement of the law of blasphemous libel as laid down in *Starkie*, and stated by his father, Mr. Justice Coleridge, against that contended for by

Mr. Justice Stephen in his *History of the Criminal Law*—viz., that it was the manner in which an attack on Christianity was made, and not the matter, which made it libellous. The reasons adduced for this opinion, however, are hardly of much weight. The consequences of holding the reverse view, that to attack Christianity, however respectfully, was criminal, founded as it was on the doctrine that Christianity was part of the Constitution, would be that any political attacks on, say hereditary monarchy, or the law of primogeniture, would be criminal also. But the judges who laid down that attacks on Christianity were blasphemous libels did hold that attacks on the monarch were seditious libels. Because the consequences of the law being what it is said to be by Mr. Justice Stephen would be monstrous, that did not prove that the law is not so; it only proves that there is every reason why it should be changed. The Chief Justice's ruling may be upheld more surely on the ground that the law has been so stated for the last thirty years, and that it is expedient that the modern should overrule the ancient authorities, that on the mere inference that because the logical result of the ancient ruling would be absurd, therefore it is not the law. However, the case did not turn upon the issue of blasphemy or no blasphemy, but on that of publication of the alleged libel by the defendant. On this point the Lord Chief Justice in his summing-up dwelt exhaustively with the subject of the criminal liability of the proprietor or editor of a paper for the publication of a libel. This involves the construction of the 7th section of Lord Campbell's Act (6 & 7 Vict. c. 96). The section runs "that whensoever upon the trial of any indictment or information for the publication of a libel, evidence shall be given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent or knowledge." The much discussed case of *Regina v. Holbrook* (37 L. T. Rep. N. S. 530) decided that in a trial for a defamatory libel evidence that the defendant, although proprietor or having the general control over a newspaper, had intrusted the sole charge of it to an editor, and had not authorized and had no knowledge of the particular libel incriminated, was within the section, and afforded a complete answer to the charge. Lord

BLASPHEMY AND BLASPHEMOUS LIBELS.

Coleridge held that the section applied equally to an indictment for blasphemous libel, the words of the section being, unlike those of the other sections of the Act, not confined to defamatory libels, but perfectly general in its terms. The evidence against Mr. Bradlaugh consisted in his having, under the name of the Freethought Publishing Company, formerly been the publisher of the paper in which the libels appeared, and in the paper being sold in a shop of which he was proprietor. But, according to Mr. Justice Lush, in *Regina v. Holbrook*, "A proprietor whose agent sells over the counter libels without his knowledge would not be criminally liable if able to show that the sale was without his authority." As Lord Coleridge left the question to the jury, it was not "whether Mr. Bradlaugh had anything to do with the paper, but whether he had authorized the sale of the articles complained of; it was not enough that he might have stopped them, the question was whether he had authorized their sale or publication." The ruling adopted by the Lord Chief Justice may now therefore be taken to be settled law, that in an indictment for any kind of libel which appears in a newspaper, the question is not whether the defendant authorized the publication of the paper, but whether he authorized the publication of the libel.

Much as we dislike the licentious Free-thinkers, we say that, to the credit of the law, and to the credit of a Middlesex jury, the mischievous prosecution of Mr. Bradlaugh for blasphemy has failed. Lord Coleridge, who fortunately presided at the trial, declined to express any opinion as to the wisdom of the law or of the prosecution; but what his opinion of both was sufficiently appeared from the tone and manner of his summing-up. The learned judge pointed out that, if attacks upon the Christian religion are to be punished criminally because the Christian religion is part of the law of the country, it would be equally reasonable to punish criminally attacks upon monarchy, primogeniture, or the marriage laws—all equally a part of the fundamental laws of the Constitution.

It may surprise some persons that in Mr. Bradlaugh's case the summing-up of Lord Coleridge did not agree with the recent judgment of Mr. Justice North, or the well-considered opinion of Mr. Justice Stephen. There is a general opinion that law, as far as it depends on the judges, is a fixed science, and that the personal opinions of judges have

no weight whatever. Yet even in that most exact of sciences, astronomy, there is a well-known element in observations called the "personal equation," which differs not only in different individuals, but in the same individual at different times. And to make the record of observations perfectly accurate, this "personal equation" has to be reckoned and allowed for. When, therefore, we assert that a similar "personal equation" exists in the judges, we must not be supposed to detract aught from the science of law or their own ability and integrity. There will be always the schools of Labeo and Capito, there will always be Liberals and Conservatives. And there is no doubt that, in the division of opinion to which we have alluded, some judges have laid down the law as it would have been laid down centuries ago, considering that the court has no power to alter law, and that it must remain unaltered except the Legislature interferes, while an equally eminent judge takes a view of the law more in harmony with general public opinion. It may be remembered that, in *Shaw v. Earl of Jersey* (4 C. P. Div. 120), Lord Coleridge, for the first time, granted an injunction to restrain a landlord from dis-training.

It is not to be expected, in the present state of parliamentary business, that any amendment of the law of blasphemy will be carried; but, as the summing-up of Lord Coleridge in Mr. Bradlaugh's case has drawn attention to the fact that, in the opinion of certain high authorities, any denial, however respectful and decorous, of the truth of Christianity is indictable, attempts at least to amend the law may be expected before long. The peculiar severity of the Act for the Suppression of Blasphemy and Profaneness (9 & 10 Will. 3, c. 32; 9 Will. 3, s. 35, in the Revised Statutes) may perhaps be expected to form a strong argument for amending it. By this Act, "if any person having been educated in the Christian religion shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or shall assert that there are more Gods than one [this much of the statute is repealed by 35 Geo. 3, c. 160], or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, and shall, upon indictment or information, be thereof convicted, such person shall for the first offence be adjudged incapable and disabled in law, to all

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intents and purposes, to have or enjoy any office, employment, ecclesiastical, civil or military ;" and it is further enacted that, "if such person shall be a second time lawfully convicted of the aforesaid crime, he shall from thenceforth be disabled to sue any action, or to be guardian of any child, or executor or administrator of any person, or capable of (*sic*) any legacy or deed of gift, or to bear any office for ever, and shall also suffer imprisonment for the space of three years." Any person whatever may, without even being under the necessity of complying with the requirements of the Vexatious Indictments Act, indict any person under the statute of William III., and it will be observed that the disabilities which are to follow upon a conviction are prescribed in such explicit terms that no court would have any power to remit them, or abate one month of the three years' imprisonment. If any great practical difficulty should arise out of an application of the Act to theological controversialists, it may possibly come to be provided, by way of compromise and to avoid the repealing of the Act, that no prosecution may be commenced under it without the sanction of the Attorney-General or other public officer, and perhaps even that the Crown may have the power to remit the disabilities. Precedents for such a course in the similarly thorny question of Lord's Day observance may be found in the Sunday Observance Prosecution Act, 1871 (34 & 35 Vict. c. 87), and the Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80); the first of which Acts is a temporary Act, continued from time to time by Expiring Laws Continuance Acts.—*Law Times*.

On April 25 and 26, the case of *Regina v. Ramsay and Foote* was tried at the Royal Courts before the Lord Chief Justice of England (Lord Coleridge), and a special jury. In the course of his summing up, the Chief Justice said:—Now, you have heard with truth that these things are according to the old law, or the *dicta* of the old judges, undoubtedly blasphemous libels, because they asperse the truth of Christianity. But, as I said on the former trial, for reasons I will explain presently, I think that these expressions can no longer be taken to be a true statement of the present day. It is no longer true, in the sense in which it was so when these *dicta* were uttered, that Christianity is part of the law of the land. At the time those *dicta* were uttered, Jews and Nonconformists, and others under disabilities for religion, were regarded

as hardly having civil rights. Everything almost, short of punishment by death, was enacted against them, not indeed, always by name; and thus the exclusion of Jews from Parliament was in a sense by accident (though, no doubt, if anybody had supposed that they were not excluded a law would have been passed to exclude them), but historically and as a matter of fact, such was the state of the law. But now, so far as I know the law, a Jew might be Lord Chancellor—certainly a Jew might be Master of the Rolls—and but for the accident that he took the office before the Judicature Act came into operation, the great and illustrious lawyer, whose loss the whole profession is deploring, would have had to go circuit, and might have sat in a Criminal Court to try such a case as this; and he might have been called upon, if the law be really that "Christianity is part of the law of the land," to lay it down as the law to the jury, some of whom might have been Jews; and he might have been bound to tell them that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah—a thing which he himself did deny, and which Parliament had allowed him to deny, and which it is just as much a part of the law that any one may deny as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of an aspersion on the truth of Christianity, *per se*, on the ground that Christianity is—in the sense in which it was said by Lord Hale, or Lord Raymond, or Lord Tenterden—part of the law of the land is, in my judgment, a mistake. It is to forget that law grows; and that though the principles of law remain, yet (and it is one of the advantages of the common law), they are to be applied to the changing circumstances of the times. Some may say that this is retrogression; but I should rather say that it is the progression of human opinion. And, therefore, merely to discover that the truth of Christianity is denied, without more, and to say that thereupon a man may be indicted now for blasphemous libel, is, as I venture to think, absolutely untrue; and I, for one, will not, until it is authoritatively declared to be the law, lay it down as law; for, historically, I cannot think that I should be justified in so doing, since Parliament has enacted laws which make that old view of the law no longer applicable; and it is no disrespect to the older judges to think that what they said in one state of things is no longer applicable now that it is altered. It is clear to my mind

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that the mere denial of the truth of the Christian religion is not enough to constitute the offence of blasphemy. But no doubt, whether we like it or not, we must not be guilty of anything like taking the law into our own hands, and converting it from what it really is to what we may think it ought to be. I must lay the law down to you as I understand it, and as I read it in the books of authority. Mr. Foote, in his very able speech, spoke with something like contempt of "the late Mr. Starkie." He did not know Mr. Starkie; he did not know how able and good a man he was. He died when I was young; but I knew him, and everybody who knew him knew that he was a man, not only of remarkable power of mind, but a man of very liberal opinions; and if ever the task of law-making could safely be left in the hands of any man, it might have been left in his. But what is more material, the statement of the law by Mr. Starkie has again and again been assented to by judges as a correct statement of the existing law, and I will read it as containing in my view a correct statement of it:—"There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits are most likely to form correct conclusions; yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon those discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing a mischief, must in general tend to the advancement of truth and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering that society are more than compensated for the partial and limited mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and truth from the exertion of free and unfettered minds. It is the mischievous

abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others by means of licentious and contemptuous abuse applied to sacred subjects, or by wilful misrepresentations, or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law as well as morals—a state of apathy and indifference to the interests of society—is the broad boundary between right and wrong":—(Starkie on Slander and Libel, 4th edition, p. 599). And there is a passage in the book which appears to have been taken from Michaelis, in which it is pointed out with some truth that in one view the law against blasphemous libel may be for the benefit of the libeller himself, who otherwise may encounter popular vengeance. The Chief Justice quoted the passage, and stated that the principle of the law was as laid down by Starkie; and that he was not satisfied that the law was laid down differently by a study of the cases. He proceeded to refer to *Rex v. Taylor*, Venty, 293, before Lord Hale; *Rex v. Woolston*, Str. 834, better reported, as the Chief Justice said, in Fitzgibbon 64, before Lord Raymond; and *Rex v. Waddington*, 1 B. & C. 26, before Lord Tenterden, Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Best. After referring to the passages cited by one of the defendants from various writers, the Chief Justice concluded:—"What he has to show is, not that other persons were as bad, but that he is not bad—not that others are guilty, but that he is not so. It is no defence for him to bring forward cases some of which I confess I cannot distinguish from his own. It is not enough to say that these persons have published blasphemy, if they are not brought before us. I not only admit, but feel that, if laxity in the administration of the law is bad, the most odious form of laxity is a discriminating laxity, which lays hold of particular persons, and does not lay hold of others liable to the same censures. But that has nothing to do with this case. The case is here; and whether or not other persons ought to be where the defendants stand, the question is, What judgment should be passed upon them? We have to administer the law, whether we like it or not. It is undoubtedly a disagreeable law to administer; but I have given you reasons for thinking it is not so bad

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as has been supposed. It is just that persons should be obliged to show some respect for those who differ from them. You will see these publications; and if you think they are permissible attacks on the Christian belief, you will find the defendants not guilty; but if you think that they do not come within the largest and most liberal view of the law as it exists, then, whatever may be the consequences, and however little you may like them, it is your duty to find them guilty. It is your duty to administer the law as you find it, and not to strain it on one side or the other—certainly not to strain it in the defendants' favour, however you may think that they ought not to be prosecuted, still less to strain it against them because you may not agree with the sentiments they avow. Take the publications in your own hands, and say whether the defendants are guilty. As to the cartoons, the excuse is that they are not attacks upon, or caricatures of Almighty God. Mr. Foote declares that if there be such a Being, He is the proper object of reverence and awe; but that these are only his mode of holding up to contempt and ridicule what he considers the caricature of God exhibited in the Hebrew Scriptures. You will look at them, and judge for yourselves whether or not they come within the law, and whether or not the defendants are guilty of publishing blasphemous libels."

In the result the jury were unable to agree, and were discharged.—*Law Journal*.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

CHANCERY DIVISION.

TRUST AND LOAN COMPANY V. MCCARTHY.

*Mortgage suit—Dispute note—Judgment on *præcipe*.*

Where a statement of defence is filed in a mortgage action for foreclosure or sale, which amounts simply in substance to a notice disputing the amount of the plaintiffs' claim, judgment may be entered on *præcipe*.

[April 30.—PROUDFOOT, J.]

A. H. Marsh, for plaintiff, moved for a direction to the Registrar to enter judgment on

præcipe. The action was brought by the plaintiffs for foreclosure, and the plaintiffs prayed also for an order for delivery of possession. The defendant had filed a statement of defence in which he alleged (1) that the plaintiffs were in possession; (2) that they had or might have received rents which they had not credited; and (3) asking for an account.

He stated that the Registrar of the Chancery Division had expressed a doubt whether judgment under the circumstances could be signed under either Rule 78 or 520, as he thought from the judicial construction which had been placed on the Rules, that the former Rule was limited to cases of non-appearance, and the latter to cases where no defence is put in. It was submitted that under the former Chancery practice, a decree on *præcipe* might have been granted on such an answer being put in.

PROUDFOOT, J., after taking time to consider the matter, held that the statement of defence amounted to a mere dispute note, and that the former practice was impliedly kept in force by Rule 3, which provides that Orders 638 to 650 shall apply to all the Divisions of the High Court. Order 646 expressly refers to Orders 434 and 435, under which, according to the former practice, a decree on *præcipe* could have been obtained in a similar case to the present. As regarded the claim for possession, he thought the judgment should contain an order for the delivery of possession by the defendant to the plaintiffs, but that the Registrar might properly insert in the judgment a clause declaring the judgment to be without prejudice to any question that might be raised by the defendant on the taking of the accounts as to the liability of the plaintiffs to account as mortgagees in possession.

UNITED STATES

COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY.

COMMONWEALTH V. PHIPPS.

Forgery—Fraud.

1. An indictment charging the fraudulent making and signing of a receipt for a warrant, which was in words and figures as follows:—"Guardians of the Poor, 3, 27, 1882, \$389, No. 969, item, Walter S.

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Murphy. Received above warrant.—W. S. Murphy," is a good indictment under the 169th Section of the Act of March 31st, 1860 (Purdon, 364, pl. 253, which provides that "if any person shall fraudulently make, sign, alter, utter or publish, or be concerned in the fraudulently making signing altering, uttering or publishing any written instrument, other than notes, bills, checks or drafts, already mentioned, to the prejudice of another's right, with intent to defraud any person or body corporate, or shall fraudulently cause or procure the same to be done, he shall be guilty of a misdemeanor."

2. *Commonwealth v. Mulholland*, 12 Phil. Rep. 608, distinguished.

Demurrer to bill of indictment.

Opinion by ALLISON, P. J. April 26th, 1883.

The indictments to which the defendant has demurred, and which he also moves to quash, charge the fraudulent making and signing of written instruments with intent to defraud the several persons whose names are set forth, and to the prejudice of their rights. There are also counts for uttering and publishing the same unlawfully and fraudulently.

In each count the copy of the written instrument is set out fully in words and figures, which is thus made to speak for itself, by which it appears that it is a receipt for a warrant issued by the Guardians of the Poor for the payment of money. In the bill before me, as of September Term, 1882, No. 327, it is in form, words and figures as follows:—"Guardians of the Poor, 3, 27, 1882, \$389, No. 969. Item, —. Walter S. Murphy. Received above warrant. W. S. Murphy."

In each of the remaining indictments, like copies of the receipts, charged as having been fraudulently made and signed, are set forth, with the variation, in each instance, of the insertion of the name of the individual payee whose name, it is claimed, was fraudulently signed by the defendant to the several receipts. Each of these indictments contain four counts; the third charges the defendant with fraudulently making and signing, and the fourth with uttering and publishing said written instruments, and contains the statement as follows:—"Being a receipt for a certain warrant so drawn as aforesaid."

This refers to a preceding averment, that the person or firm whose name is said to be falsely signed to the receipt had furnished to an institution for the care of paupers in the City of

Philadelphia, under the control of a body of persons called the Board of Guardians of the Poor, and known and called the Blockley Almshouse, certain goods and merchandise, and that the warrant for the payment of the same had been duly drawn in favor of said person (setting forth the name) by the said Board of Guardians of the Poor upon the Treasurer of the said city.

These indictments are framed under the 169th section of the Act of March 31, 1860, (Purdon, 364, plac. 253), which makes it a misdemeanor to fraudulently make, sign, alter, utter, or publish any written instrument to the prejudice of another's right, with intent to defraud. The punishment for this offence is imprisonment by separate and solitary confinement at labour not exceeding ten years. The section is classified by the compiler of Purdon under the head of "forgery." In the order of arrangement it is followed by the 170th and the 171st sections of same Act, which refer to forging the seal of the Commonwealth or of courts, or forging of records, registries, etc., for which the punishment is limited to seven years. To this classification is added the 172nd section of the same Act, which relates to counterfeiting any number or mark of any public inspector, etc., for which offence not more than one year's imprisonment may be imposed. It is contended that an indictment under the 169th section of this Act is not forgery. The words "forge" or "forging" are not inserted or used to describe the offence defined or created by this section of the law, as they are used in the two following sections, and it is therefore contended that the Legislature intended to distinguish this offence from the other offences in which the words forge or forging are employed.

It will be seen, however, by a reference to the four consecutive sections of the Act of 1880, placed in the Digest under the head of forgery, that the offences are all declared to be misdemeanors, and that the punishment under the 169th section may be much more severe than under the sections in which the words forge or forging are inserted. It may, therefore, be asserted that the offence was not regarded by the Legislature as in its degree of criminality falling below those which, in the same connection, are characterized, directly or by implication, as constituting the crime of forgery. But

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is the offence less forgery because it is not, *eo nomine*, so designated? In common understanding, to forge is to counterfeit, to falsify, to feign, to fabricate. As illustrated by Worcester, it is "to forge a note or signature." The common law definition of forgery is a fraudulent making or alteration of writing, to the prejudice of another man's right, or the false making of an instrument, which purports on its face to be good and valid for the purpose for which it was created, with a design to defraud any person or persons. In 3 Greenleaf's Evidence, sec. 103, to the former definitions is added the remark, "that forgery may be committed of any writing, which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right." Now, tested by this standard, what element of the common law definition of forgery is wanting in the 169th section of the Act of March 31st, 1860, when it makes it an indictable offence to fraudulently make, sign, alter, utter, or publish any written instrument other than those which are recited in this section to the prejudice of another's right, with intent to defraud any person or body corporate? This, in fact, it will be seen to be, very slightly, more or less, than reciting the text of Blackstone's definition of forgery, as he lays it down in his Commentaries, 4 Black. 347. What difference, therefore, can it make that the law making power of the Commonwealth when legislating on this description of crimes, holds the language, if any one with fraudulent purpose shall *make* any false instrument, instead of saying if any one shall *forge* such an instrument, connecting as they do with such making, every essential element of the common law crime of forgery? In the four sections of the Act of 1880 before cited, in two of which the word *forge* is found, and in two of which it is omitted, the words to make and to forge are convertible terms, having the same meaning. They all relate to making false writings or stamps. It is not possible to forge in the sense in which the word is here used without a fraudulent making of a written instrument, and to fraudulently make an instrument such as is described in the 169th section of the Act, implies the necessity of forging such a paper. It is not the name alone which determines the character of the offence, to what class of crime it belongs, or what in substance and in fact it is. We look rather to the framework or structure of the

crime as the Legislature has constituted it, and to its essential characteristics, in order to ascertain what it is. Subjected to the most critical examination, it will be found that the offence set forth in the 169th section is forgery, pure and simple, as the common law has defined it. It follows from this that the offence contemplated by the 169th section of the Criminal Procedure Act may be laid in an indictment as a fraudulent making of a written instrument, with fraudulent purpose under the statute, or it may take the form of an indictment for forgery, as at common law, and whatever be the form of the indictment the crime is as much forgery in one case as in the other. This has practically been decided by our Supreme Court, in the case of the *Commonwealth v. Luberg*, 13 Norris, 85. The indictment was under the Act now before us for consideration for making fraudulent entries in the books, reports and statements of a National bank, with intent to defraud the bank; Judge Paxson, delivering the opinion of the court, says, the indictment charges an offence which was a crime at common law. It is plain the plaintiff in error could have been indicted for forgery. The indictment here is laid under the statute, and does not charge the offence of forgery in the technical manner required by the strict rules of the common law. That the Act of Assembly does not call it forgery makes no difference. It is the same offence. In the case of the *Commonwealth v. Beamish*, 31 P. F. S. 389, the same principle was recognized. The indictment was held to be good under the statute, though not sustainable, as it was framed at common law, because neither copy nor purport of the whole, nor the part of the instrument of writing altered, was set forth or described.

The averment in the indictment was the fraudulent alteration of a book and writing commonly known as the duplicate of taxes levied for the use of the school district. Here the entire instrument of writing is copied into the indictment, which is thus shown to be a receipt perfectly intelligible on inspection, which requires no averment of extrinsic facts to make it appear that it is of a character calculated to work an injury to the person whose rights it is charged have been prejudiced by the defendant's alleged fraudulent signing of their names. It cannot, we think, be successfully maintained that each count of the indictment does not give to the de-

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fendant full information of the nature and cause of the accusation against him, to which he is entitled under Section 9 of Article 1 of the Constitution of the State. This is a radical distinction between the present case and that of the *Commonwealth v. Mulholland*, 35 *Legal Intelligencer*, 112, 12 Philadelphia Reports, 608, upon which defendant, to some extent, relied as an authority in support of the present application. The instrument in that case, alleged to have been fraudulently altered, had no writing of any kind upon it; it was made up of figures and marks, with nothing to explain their meaning. The indictment was very properly quashed, because the copy of the forged instrument was insensible upon its face, and no extrinsic circumstances were shown by which the court could judicially ascertain its tendency or effect.

This was a fatal defect: (Archbold's Criminal Pleas and Practice, p. 808). But if there is any force in the objection that the first and second counts are defective for want of the averment of extrinsic facts, to explain the copy of the written instrument and connect the defendant with it, which we think there is not, no such objection can be supported, whatever view may be taken of the question, as to the third and fourth counts. Demurrers and motions to quash, under our system of criminal pleading, are not favored if they relate to matters of form only, and not to matters of substance. That indictments might have been framed, which would have stated the charge of the Commonwealth against the defendant with greater fulness and precision, may well be conceded; but an objection on this ground cannot prevail, if the substantial requirements of the law have been complied with, and this we think has been done in these indictments. Each count is sustainable as meeting the substantial demands of a common law indictment for forgery.

Here we have the charge of the intent to defraud. The instrument (a receipt) shows that it is of a character to work prejudice and do injury. It is an instrument of writing of no doubtful significance. It is free from the objection which prevailed in the *Commonwealth v. Frey*, 14 Wright, 245, because the copy of the receipt is accurately set out. And there is no obscurity or ambiguity about it which requires the averment of extrinsic facts, certainly none other than

such as are laid in each of the third and fourth counts.

We have been unable to discover in the several grounds of demurrer assigned, or in the reasons presented in support of the motion to quash, the force which the counsel representing the defendant attached to them. That a receipt is a written instrument, in the legal as well as common understanding of that word, we think, cannot be well questioned. Its meaning is as well known and its use quite as common as that of a deed or will. It falls within the designation of a private document, whereby another person may be injured. The definition of the word as given in Bouvier, to which we have been referred, has no application to the point before us. Bouvier defines the word in its application to contracts or agreements only, and does not attempt to express its meaning when used in relation to other matters.

The false signing by initial of the first name may be forgery, where the intent is to deceive and defraud, especially where such intent is shown by signing almost directly under the full name of the payee of the order. W. S. Murphy in such case is the equivalent of Walter S. Murphy, if it was so intended by the person who wrote it.

It certainly cannot be necessary, as seems to be supposed, to explain the meaning of the words "making and signing," or the word "warrant." Some things must be taken for granted, even in technical pleading. An indictment is not intended to be a lexicon.

The reasons in support of the motion to quash are substantially the same as those which have been assigned as grounds of demurrer, except the sixteenth assignment, which states that, after the indictment had been returned as and for a true bill for fraudulently making and signing a written instrument, and publishing the same, it was by erasure, alteration, substitution or mutilation, by some third person without authority of law, entitled as and for a bill for forgery and for uttering and publishing a forged instrument. This reason is not supported by anything which appears on the face of the indictment. The designation of the character or contents of the indictment which appears on the back of it may have been changed in the manner stated before the bill was sent to the Grand Jury. Nothing to the contrary appears on the

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NOTES OF CANADIAN CASES.

[Prac. Cases.]

indictment itself, but if the matter set up in this reason is true in point of fact, it would not be sufficient to require us to quash the indictment. The finding of the Grand Jury must stand or fall, not by the designation on the back of it, which is no part of the finding, but by what is contained in the body of the instrument. It is the charge which the Commonwealth prefers against a defendant to which the finding of the Grand Jury refers, and not to the merely clerical endorsements of the District Attorney or the Clerk of the Court on the back of the bill. The only material portion of such endorsements is that made by the Grand Jury of their finding.

Demurrers overruled, and motion to quash dismissed.

George S. Graham, District Attorney, for the Commonwealth.

James H. Heverin and *Furman Sheppard*, Esqs., for the defendant.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

The Chancellor.] [March 7, 1883.

RE BATT, WRIGHT v. WHITE.

Administration suit—Executor—Costs.

In an administration suit instituted by an executrix and residuary legatee against her co-executors, on the taking of the accounts, \$330.84 more was found in the hands of the defendants than they had admitted in their statement of defence, caused (a) by their compensation being fixed by the Master at a less sum than they had claimed; and (b) by a mistake in omitting to give credit for an item of receipts which they at once admitted on its being discovered; and (c) by their being charged with \$80 for witnesses. But it appeared that the litigation had really been caused by the fact that the defendant, having received a sum of money to which the plaintiff's infant daughter was entitled, had paid it to the plaintiff on the agreement that she should procure herself to be appointed guardian to her daughter, and obtain authority to receive the money; and the plaintiff having neglected to procure herself to be appointed guardian, the

defendants had claimed to hold a sum out of the residuary share of the plaintiff, as an indemnity against the moneys so paid to her.

Held, notwithstanding that a larger sum had been found against the defendants than they had admitted, they were entitled to be paid their costs out of the estate.

Held, also, that the claim of the defendants to administer was reasonable, and that out of the residue in their hands to which the plaintiff was found entitled, they might properly pay into Court, to the credit of the daughter, a sum equal to that paid to the plaintiff on her daughter's account; and that upon such payment being made, the plaintiff should be at liberty to retain the moneys so paid to her on account of her residuary legacy.

PRACTICE CASES.

Osler. J.] [July 11, 1882.

BANK OF BRITISH NORTH AMERICA v. EDDY.

Examination—Defendant out of jurisdiction—G. O. Chy. 138-144.

An appointment was made *ex parte* by the Master at Ottawa for the examination of the defendant at his office in Ottawa, at 10 o'clock, on 28th June. A copy of the appointment, and of a subpoena, were served on the defendant, who resided in Hull, P. Q., and a copy of the appointment on the defendant's solicitor.

Held, that the proceedings were regular and warranted by G. O. Chy. 138: (*Moffatt v. Prentice*); and that consequently relief might be had against the defendant who failed to attend on the examination under G. O. Chy. 144.

Held, also, that such an appointment might be made *ex parte*.

Semble, that this mode of examination, and that provided for by R. S. O. ch. 50., were not interfered with by sec. 52 O. J. A.

W. Fitzgerald, for the plaintiffs.

H. Cassels, for the defendant.

GUNTHER v. COOKE.

Disobedience of court order—Attachment—Discharge—Practice in moving.

A deputy sheriff was arrested under a writ of attachment for default in obeying an order upon

Prac. Cases.]

NOTES OF CANADIAN CASES.

[Prac. Cases.]

his sheriff to deliver up to the claimant, who succeeded on an interpleader issue, the goods, etc., seized.

Upon a motion by the deputy sheriff to be discharged from custody, it was shown that this non-compliance with the order arose from a difficulty in which he found himself by the claim of another person, who had succeeded in an issue about the same goods, and not from any deliberate intention to disregard the order.

It was ordered that the deputy sheriff be discharged from custody.

Semble, that the motion should have been for leave to administer interrogatories to, or for the examination of the person committed, and for a *habeas corpus*.

Judge of Co. of Lambton. }
Cameron, J. } March 13, 1883.

BRADLEY V. CLARK.

Third party—Examination—Rule 224 O. J. A.

Held, that though on the face of the pleadings there was no direct issue between the plaintiff and third party, yet as the latter had all the rights of the defendant, and virtually took his place, the case was within the spirit, at all events, of Rule 224 O. J. A., and that the plaintiff should be allowed to examine the third party after issue.

Holman, for the defendant.

Aylesworth, for the third party.

Rae, for the plaintiff.

Master in Ordinary.] [March 31.

HUTTON ET AL V. FEDERAL BANK ET AL.

Surety—Payment by—Interest.

Sureties who had paid the debt of a principal, claimed interest on moneys paid to the creditor under a special agreement, and also a return of interest in excess of seven per cent. paid by them to the Federal Bank on successive renewals of the notes given as collateral security for the debt of the principal.

C. R. W. Biggar, for the plaintiff.

H. J. Scott, for the Insurance Company.

Cattanach, for the Bank.

H. W. M. Murray and *Hoyles*, for other defendants.

Boyd, C.]

[April 21.

OLD V. OLD.

*Interim alimony—Conduct of Plaintiff—
Condition of payment.*

Hoyles appealed from the order of the Master at Goderich, allowing the plaintiff \$6 a week for interim alimony, and showed that when plaintiff left defendant's house she took with her his books of account, notes and securities, and did not leave him with the means of paying interim alimony. He cited *Browne on Divorce*, p. 195; *Bremner v. Bremner*, 3 Sw. Tr. 219.

Order made staying the payment of alimony to the wife until she has produced on oath, in the office of the Master, all books, securities and notes, taken from defendant, which are to be delivered up to him; the plaintiff to give the usual undertaking to go to trial. No costs of appeal.

H. Cassels, for plaintiff.

Boyd, C.]

[May 2.

RE YOUNG.

*Conveyance—Operative words in—Mistake—
Intention.*

This was an application under the Vendors and Purchasers Act, to obtain the opinion of the Court as to whether any, and if any, what estate passed and to whom under a deed dated 15th February, 1865, and made between Edward Musson, of the first part, Ann Musson, his wife, of the second part, and Alexander Gemmell and Jane Isabella Gemmell, wife of the said Alexander Gemmell, of the third part, whereby, "in consideration of the love and affection which he hath and beareth to the said parties of the third part, and also in further consideration of the sum of \$5, now paid by the said party of the third part, the receipt, etc., he, the said party of the first part, doth grant unto the said party of the third part, his heirs and assigns forever, all and singular, etc., to have and to hold unto the said party of the third part, his heirs and assigns, to and for his and their sole and only use forever."

Held, that the conveyance effectually vested an estate in fee simple in the husband by the operation of the Statute of Uses; also, that another construction equally effective if adopt-

LATEST ADDITIONS TO OSGOODE HALL LIBRARY—THE TITUS CASE.

ed to carry the fee, would be to regard the limitation as an estate for life by entireties to husband and wife as being the joint party of the third part, with remainder in fee to the heirs of the husband.

Kent, for the vendor.

McCaul, for the purchaser.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

CONTRACTS :—

Principles of the English Law of Contracts, and of Agency in its relation to Contract. By Sir Wm. R. Anson, Bart., D. C. L. Second edition. Clarendon Press, Oxford, 1882.

DOWER :—

A Treatise on the Law of Dower. By M. G. Cameron. Carswell & Co.

ELECTION CASES, 1883 :—

Reports of the decisions of the Judges for the trial of Election petitions in Ontario, relating to elections to the Legislative Assembly of Ontario, 1871-75-79, and to the House of Commons of Canada, 1874-78. By T. Hodgins, Q.C. Carswell & Co.

CRIMINAL LAW :—

Principles of the Criminal Law. A concise exposition of the nature of crime, the various offences punishable by the English Law, the Law of Criminal Procedure, and the Law of Summary Convictions, with the table of offences, their punishments and statutes, tables of cases, statutes, etc. By S. F. Harris, B.C.L., M.A., &c. Revised by the author and F. P. Tomlinson. Stevens & Haynes.

TITLES :—

The Investigation of Titles to Estates in fee simple. By T. W. Taylor, Q.C. Second edition. Willing & Williamson.

CONTRACT :—

The Law of Contracts, by J. W. Smith. Seventh edition. By Mr. Thompson. Stevens & Haynes.

JUDICATURE ACT :—

A manual of practice of the High Court of Justice for Ontario, under the Ontario Judicature Act, 1881, with the additional rules of the Supreme Court of Judicature for Ontario, passed 21st May, 1881. By G. S. Holmsted Rowsell.

WILLS :—

A concise treatise on the Law of Wills. By H. S. Theobald. Second edition. Stevens & Haynes.

EQUITY :—

The Principles of Equity, intended for the use of students and the profession. By E. H. T. Snell. Sixth edition ; to which is

added an epitome of the Equity practice. Third edition. By A. Brown. Stevens & Haynes.

EQUITY :—

A Manual of Equity Jurisprudence, for practitioners and students. By J. W. Smith. Thirteenth edition. Stevens & Sons.

COMMON LAW :—

Commentaries on the Common Law, designed as introductory to its study. By H. Broom. Sixth edition. Maxwell & Son, London.

COMMON LAW :—

A manual of Common Law, for Practitioners and Students, comprising the fundamental principles, and the points most usually occurring in daily life and practice. By J. W. Smith. Ninth edition. Stevens & Sons.

EVIDENCE :—

The principles of the Law of Evidence, with elementary rules for conducting the examination and cross-examination of witnesses. By W. M. Best. Sixth edition. By J. A. Russell. Sweet.

CONVEYANCING :—

Shewing the present practice relating to the daily routine of conveyancing in solicitor's offices, to which are added concise common forms and precedents in conveyancing. Sixth edition. By H. Greenwood. Stevens & Sons.

BLACKSTONE :—

Commentaries on the Laws of England applicable to real property. By Sir Wm. Blackstone, Knight, adapted to the Laws of Ontario, by A. Leith, Q.C., and J. F. Smith. Second edition. Rowsell.

THE TITUS CASE.

The following is the correspondence between Mr. Marsh and Mr. Titus, which resulted in the charge made by the latter :—

BRIGHTON, 13th April, 1883.

Re Wright.

DEAR SIR,—I wrote you last week, but have just learned that you have not received my letter. Have you any objection to allowing this matter to stand for ten days or a fortnight, until I can see what I can undertake to procure for your satisfaction.

Yours,

L. U. C. TITUS.

A. H. Marsh, Esq.

TORONTO, 16th April, 1883.

Re L. U. C. Titus.

DEAR SIR,—I am in receipt of your favour of the 13th inst. The matter may stand for the fortnight mentioned by you, and unless it is satisfactorily arranged by that time, or such evidence of *bona fides* has been furnished as may convince me that proper efforts are being made

THE TITUS CASE.

in that direction, and that a satisfactory settlement is then imminent, I shall proceed without further notice.

Yours truly,
A. H. MARSH.

L. U. C. Titus, Esq.

BRIGHTON, 17th April, 1883.

Re Wright.

DEAR SIR,—Yours of yesterday to hand. Will you kindly inform me what will be a satisfactory settlement as required by your letter, so that I may know exactly what you may require of me, and may not unnecessarily delay matters.

Yours,
L. U. C. TITUS.

A. H. Marsh, Esq.

TORONTO April 18, 1883.

Re L. U. C. Titus.

DEAR SIR,—There are two things that require to be done in order to arrive at a settlement herein. One is the payment of the money found due by the Master's certificate. The other is that a release shall be procured from all the relations of young Ryan who would be entitled to have an action brought on their behalf under the Civil Damage Act, and the release must cover all damages that might be recovered by virtue of that Act. If you will instruct me as to the names of the parties, and the name of young Ryan's administrator, I will prepare such a release and forward it to you. It must be executed in the presence of some independent witness, who hears it read over to the parties signing the same.

Yours truly,
A. H. MARSH.

L. U. C. Titus, Esq.

BRIGHTON, 23rd April, 1883.

Re Wright.

DEAR SIR,—Yours of the 18th inst. at hand. I think that possibly you underrate the value that Ryan's relatives place upon their claims against Miss Wright. I do not think I could induce them to compromise for the amount of the costs of the reference (\$98.81), as your letter would indicate. Not being in a position to procure a release from them for that amount, I shall endeavour to be ready to pay over the amount found due, together with costs, in the time you indicate, which, I presume, will equally meet your views. Kindly advise Miss Wright to execute release upon payment by me, and oblige,

Yours,
L. U. C. TITUS.

A. H. Marsh, Esq.

Re L. U. C. Titus.

24th April, 1883.

DEAR SIR,—I am in receipt of your favour of the 23rd inst., and beg to point out that you have apparently succeeded in drawing a meaning

from my letter of the 18th inst., which its wording will not bear. Allow me to remind you that the amount found due by the Master's certificate is \$172.98, and that is the amount that must be paid. Upon payment of that amount to Miss Wright, she will give you a receipt in full of all moneys owing from you to her. With regard to the Ryans and the amount of blackmail which they may hope to levy, I have not the same means of knowledge which you have, nor is there necessity that I should, as the ways and means by which a settlement may be effected with them is wholly a matter between you and them. Either you can effect such a settlement or you cannot. If you can it will be all the better for you. If you cannot, then you will have to take the consequence of using knowledge acquired in professional confidence as a means of stirring up litigation against a former client. You are losing time in preliminary fencing that you may afterwards need for the purpose of effecting the settlement in question. The evidences of good faith referred to in my former letter have not yet been forthcoming.

Yours truly,
A. H. MARSH.

L. U. C. Titus, Esq.

BRIGHTON, 25th April, 1883.

Re Wright.

DEAR SIR,—Yours of the 24th inst. received. I would suggest that you put your thoughts in plain English next time, and then you will be understood. A man with your ability should be able to express himself in an intelligible manner. I took the only meaning possible from your letter, and as I am not aware of any right you have to call upon me for a release of the Ryan claims, or means of compelling me to secure it, I would very much like to know in what way you propose to accomplish your object, then I may consider what inducement there is for me to buy off the Ryan family, as you suggest. Each letter you have written, conveys a different meaning; sometimes you want the money paid over, and again you want the Ryan claims settled. Let us understand each other fairly, and then no fault can be found at mistakes.

Yours,
L. U. C. TITUS.

A. H. Marsh, Esq.

26th April, 1883.

Re L. U. C. Titus.

DEAR SIR,—You have expressed a desire that I should put my thoughts in plain English, and express myself in an intelligible manner. I shall endeavour to do so. It is my present intention to have your name removed from the roll of solicitors for unprofessional conduct. Is that sufficiently explicit?

Very truly yours,
A. H. MARSH.

L. U. C. Titus, Esq.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely:—

William Renwick Riddell, Gold Medalist, with honours; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From	{	Arithmetic.
1882		Euclid, Bb. I., II., and III.
to		English Grammar and Composition.
1885.	{	English History Queen Anne to George III.
		Modern Geography, N. America and Europe.
		Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	{	Xenophon, Anabasis, B. II.
		Homer, Iliad, B. VI.
		Cæsar, Bellum Britannicum.
		Cicero, Pro Archia.
1884.	{	Virgil, Æneid, B. V., vv. 1-361.
		Ovid, Heroides, Epistles, V. XIII.
		Cicero, Cato Major.
		Virgil, Æneid, B. V., vv. 1-361.
1885.	{	Ovid, Fasti, B. I., vv. 1-300.
		Xenophon, Anabasis, B. II.
		Homer, Iliad, B. IV.
		Xenophon, Anabasis, B. V.
1885.	{	Homer, Iliad, B. IV.
		Cicero, Cato Major.
		Virgil, Æneid, B. I., vv. 1-304.
		Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

Canada Law Journal.

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JUNE 1, 1883.

No. 11.

DIARY FOR JUNE.

1. Fri... Parliament first met at Toronto, 1797.
2. Sat... Fenian attack, 1866.
3. Sun... *Second Sunday after Trinity.*
8. Fri... First Meeting of Parliament at Ottawa, 1866.
9. Sat... Easter sittings end.
10. Sun... *Third Sunday after Trinity.*
11. Mon... County Court term for York begins.
12. Tue... County Court sittings (except York) begin.
15. Fri... Magna Charta signed, 1215.
17. Sun... *Fourth Sunday after Trinity.* Burton and Paterson, JJ. Ct. of Appeal, sworn in, 1874.
18. Mon... Earl Dalhousie, Gov.-General, 1880. Battle of Waterloo, 1815.
20. Wed... Accession of Queen Victoria, 1837.
21. Thurs... Galt, J., sworn in C. P., 1869. Longest day.
23. Sat... Hudson Bay Co. Territory transferred to Dom. 1870.
24. Sun... *Fifth Sunday after Trinity.*
18. Thurs... Queen Victoria crowned, 1837.
30. Sat... Hon. J. B. Robinson, Lieut.-Gov. of Ont., 1880.

TORONTO, JUNE 1, 1883.

MR. JOHN WINCHESTER having resigned the position of Registrar of the Queen's Bench, has been appointed Inspector of the offices of sheriffs and local masters under the Judicature Act. Mr. J. S. Cartwright, who formerly did the work of the Surrogate office in the County of York, takes his place; whilst Mr. Gordon Brown succeeds to the office formerly held by Hon. Wm. Cayley.

As it is probable that Lord Coleridge will be in Canada after vacation, the Benchers have appointed a committee of their number to confer with the Bar as to a Bar dinner on the occasion of the visit of this distinguished judge. We have no doubt that arrangements will be made in accordance with the traditions of Osgoode Hall, whose entertainments have been marked with good taste, and dispensed with no niggard hand.

WE receive occasionally a bundle of the Australian *Law Times*, published at Melbourne, naturally rather stale before they reach us, and rather more so than there would seem any necessity for. In some of them is discussed the propriety of an amalgamation of the two branches of the legal profession. Things seem to be tending in that direction, and in several of the Australian Colonies a change to the system in vogue on this Continent has already taken place.

THE *American Law Review*, one of the leading organs of professional opinion in the United States, in speaking of the "intemperate attack" made by a cotemporary on the Supreme Court of Canada, on account of the criticism of that court on a judgment of the Queen's Bench of Quebec, says:—"The *Law Journal* justly points out that the criticism was entirely proper. It is hard to see how any lawyer could have any doubt on the point." With reference to our undenied charge that the strictures upon the Supreme Court in the *Legal News*, were written by a judge of the court appealed from, the *Review* says:—"It is to be hoped, for the sake of decency, that this charge will prove to be untrue."

RECENT personal experience enables us to vouch for the truth of the saying that "a spark neglected makes a mighty fire." We are sure, under the circumstances of a fire having occurred in our publisher's establishment, our readers will pardon delays. A printer's office is never a tidy place, but its appearance after partial destruction by fire is quite too hideous for description; especially to an editor who has wandered through the debris

RESTITUTION OF STOLEN PROPERTY.

with an attendant demon vainly endeavouring to piece together the charred remains of half-set copy and half-pied type; and who has had his feelings further lacerated by the true but quite unnecessary remark by the printer, that though he promised "proof," he did not guarantee it "fire-proof."

For reasons upon which we need not further enlarge we are late with this issue, and must combine the number due in the middle of the month with that of July 1st, which will be issued in good season.

RESTITUTION OF STOLEN PROPERTY.

In *Chichester v. Hill*, 48 L. T. N. S. 364, an important point affecting the construction of the Imperial Statute 24-25 Vict. c. 96, s. 100, (from which the Canadian Statute 32-33 Vict. c. 21, s. 113, is mainly taken), was recently decided by the English Q. B. Divisional Court, composed of Field and Williams, JJ., and it seems strange that although the Imperial Act has now been in force over twenty years the point decided seems never before to have come up for adjudication. The section of the statute referred to provides that on the conviction of any person for stealing, taking, etc., or knowingly receiving any chattel, money, valuable security, or other property whatsoever, the property shall be restored to the owner; and it goes on to provide that the court may make an order for the restitution of the property to the owner; provided, that if it shall appear before any such order for restitution is made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bona fide* taken, or received, by transfer or delivery by some person, or body corporate, for a just and valuable consideration, without any notice, or without any

reasonable cause to suspect that the same had, by felony or misdemeanour, been stolen, taken, etc., in such case the court shall not award or order the restitution of the security. The question for the court was whether a stolen negotiable instrument which gets into the hands of a *bona fide* holder for value, without notice of the theft, can, on conviction of the thief, be recovered by the original owner from the transferee in a civil action, and it was held by the court that the proviso in the Act not only prevented the court from making any summary order for restitution in such a case, but also protected the transferee from any liability to the original owner in any civil action. It was argued for the plaintiff that the beginning of the section providing that "the property shall be restored to the owner," applied to all kinds of property, and that the concluding words merely restricted the right to a summary order for restitution, but the court very reasonably considered that the proviso would be insensible if it merely protected the *bona fide* transferee from an order for restitution, etc., yet left him liable to an action to which he could have no defence. The case reveals the somewhat curious fact that an Act of Parliament has been construed judicially, contrary to the opinions of all the judges as to its meaning at the time it was passed. At common law the property in stolen goods was not altered by larceny *per se*, but it was liable to be divested by a subsequent sale in market overt, and Williams, J., says that he finds that it was the opinion of all the judges, when the 21 Henry VIII. c. 11, was passed, that that statute, which authorized the restitution of stolen property upon conviction of the thief, was not intended to affect the title acquired by a purchaser in market overt. But it seems a practice sprang up, at the Old Bailey, of disregarding that title, and the practice became too inveterate to be disregarded by the judges, and it was laid down by the judges, in *Harwood v. Smith*, 2 Durn. & E. 750, (although the *dicta* on this point were not necessary for the decision of that

RESTITUTION OF STOLEN PROPERTY.

case), that on the conviction of the thief the property in the stolen goods reverted in the owner, though the goods may have passed in the meantime into the hands of an innocent purchaser in market overt. In *Hill v. Chester* the court seemed to incline to the opinion that this was still the law, and that a sale of stolen chattels, not being negotiable instruments, even in market overt, will not divest the property of the person from whom they have been stolen. The case of *Cundy v. Lindsay*, L. R. 3 App. Cas. 459, however, does not appear to have been brought to the attention of the Court, and although the *dictum* of Lord Cairns in that case to which we intend to refer was not necessary for the decision, yet coming as it does from so eminent a member of the ultimate Court of Appeal it appears to be sufficient to warrant the belief that the *dicta* in *Harwood v. Smith* would not now be regarded as a correct statement of the law. In *Cundy v. Lindsay* Lord Cairns laid down the law on this point as follows:—"With regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a good title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title." Even before the Canadian Statute, it had been held in Ontario that the *bona fide* transferee for value of a stolen negotiable instrument, acquired a good title thereto as against the owner from whom it had been stolen: *Trust and Loan Company v. City of Hamilton*, 7 C. P. 98.

The result of the matter therefore would

seem to be that, so far as stolen negotiable instruments are concerned, a *bona fide* transferee thereof for value may acquire a good title as against the person from whom they may have been stolen; as regards other stolen chattels it is also possible that a *bona fide* purchaser in market overt may also acquire a good title as against the person from whom they have been stolen; but this, in the present state of the law, seems to be a doubtful point; but it seems to be clear that the acquisition of stolen chattels (not being negotiable instruments) in any other way than by purchase in market overt, will not divest the property of the person from whom they have been stolen: *Bowman v. Yielding*, Robinson & Jos. Dig. 3676.

We may before leaving the subject, notice that in Clarke and Sheppard's Criminal Law, at p. 248, the learned authors have assumed that the English and Canadian Acts are identical, and that restitution can only be ordered upon a conviction taking place, but the Canadian Act is really more extensive than the English Act in this respect, and enables the court to order restitution upon a trial for felony or misdemeanour, although the person tried for the felony or misdemeanour be not convicted, where the jury finds the property in question to be the property of the prosecutor, or even of any witness. *Regina v. The Lord Mayor of London*, L. R. 4 Q. B. 371, referred to by Messrs. Clarke and Sheppard, cannot therefore be said to be an authority for the construction of the Canadian Act.

The right to restitution of goods alleged to be stolen, has been still further extended by the Provincial Act, 45 Vict. c. 12, which enables the court to order restitution of property alleged to have been stolen, which is found in the possession of a person afterwards convicted of stealing, embezzling, or receiving other property, where the Crown does not intend to proceed upon any charge in respect of the property of which restitution is claimed.

RECENT ENGLISH DECISIONS.

RECENT ENGLISH DECISIONS.

The May number of the Law Reports consist of 10 Q. B. D. 353-477; 8 P. D. 21-101; and 22 Ch. D. 675-842.

In the first of these there are not many cases having any direct application here. *Burdick v. Sewell*, p. 363, however, to use the words of the learned judge who decided it, "raises a difficult and important question as to the effect of the Bills of Lading Act, Imp. 18-19 Vict. c. 111, (R. S. O. c. 116, sect. 5), in transferring liability to freight from the shippers to the indorsee of a bill of lading.

BILLS OF LADING—PLEDGER—R. S. O. C. 116, S. 5.

In this case Field, J., decides that the shipper of goods does not, by simply indorsing the bill of lading and delivering it to the indorsee by way of security for money advanced by him, "pass the property" in the goods to such indorsee so as to make him directly liable to the ship-owner of freight under the above enactment; in other words, it is not correct to say that the necessary legal implication from, or the effect of an indorsement of a bill of lading for an advance, is that by it the whole and entire legal property passes. After briefly reviewing the different modes in which advances against deposit of goods are made, he said the question resolved itself into whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge. "If the former, the whole and entire property would pass, and as a consequence the liability to freight would be transferred to the defendants; . . . if the latter took the security of a contract by which 'the property pass-d' to them, they cannot take the good and reject the bad. On the other hand, if the contract, although carried out by the indorsement of the bill of lading, remained merely a pledge, I think it clear that "the property" as expressed by the Act, did not pass, for by these words I understand the whole and en-

tire legal property, and not merely the limited interest which is transferred by the contract of pledge." And after referring to the cases on the subject, especially *Glyn, Mills & Co. v. East and West India Docks Co.* L. R. 6 Q. B. D. 480, and *Lickbarrow v. Mason*, 1 Sm. L. C. 7th ed. 756, he arrives at the conclusion that as between the immediate parties the intention must prevail, and in the present case he held, upon the facts, that the parties did not intend anything more than a pledge.

BUILDING CONTRACT CERTIFICATE OF SURVEYOR CONCLUSIVE.

The next case requiring notice is *Richards v. May*, p. 400. There A. contracted to build a house for B., and the 4th clause of the contract provided that all extras or additions, payment for which the contractor should become entitled to under the said conditions, should be paid or allowed for at the price which should be fixed by the surveyor appointed by B. Cave, J., held that this provision impliedly gave power to the surveyors to determine what were extras under the contract, and consequently that his certificate awarding a certain amount to be due for extras was conclusive.

LEX LOCI—LEX FORI.

The next case, *Adams v. Clutterbuck*, p. 403, illustrates the distinction between *lex fori* and *lex loci*. The main question was whether the provision of the law of England, that a right of shooting can only be conveyed by an instrument under seal, is part of the *lex loci* or *lex fori*? Cave, J., in deciding it, says:—"The provision regulates and was intended to regulate the transfer of interest in land, and unless there is compliance with the provision the grantee takes no legal estate by the grant quite irrespective of whether he is seeking to enforce the claim in a court of justice or not. I cannot doubt that the provision is therefore a part of the *lex loci* and not of the *lex fori*. . . There is no proposition of law to be found, so far as I know, in any book to the contrary. *Leroux v. Brown*, 12 C. P. 801, turns on the provisions of the Sta-

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tute of Frauds, the very language of which indicates that it is part of the *lex fori* and not of the *lex loci*.

LEASE—ENJOYMENT UNDER IMPERFECT LEASE.

This case also elicited the following observations from Cave, J., which are worthy of note:—"I can find no case in which a man who had entered into a contract to do something on property on the expiration of a term of years has been held free from liability because, although he had actually enjoyed the property, he had not acquired a vested right in the term by the instrument under which he enjoyed it . . . Of course if the lease or the term actually contracted for was never enjoyed, and there had been a failure of consideration for the promise, it would be otherwise. But if the lease has actually been enjoyed, it seems to me that justice requires that the lessee should perform that which he agreed to perform."

DEMURRER—STATEMENT OF CLAIM SHOWING FELONY.

The case of *Rooke v. D'Avigdor*, p. 412, decides that a statement of claim is not demurrable on the ground that it shows the cause of action to be a felony for which the felon has not been prosecuted. Cave, J., says:—"Whatever may be the proper mode of suspending an action or of raising an impediment to it on the ground that it is brought in respect of a felony, and that the felon has not been prosecuted, the proper mode of doing so is not, in my opinion, by demurrer."

CHARTER-PARTY—"AT MERCHANT'S RISK."

In *Burton v. English*, p. 426, which is also a decision of Cave, J., it is held that where it was stipulated in a charter-party that the "ship should be provided with a deck cargo, if required, at full freight, but at merchant's risk," the words "at merchant's risk" excluded any right on the part of the charterers to general average contribution from the ship-owners in respect of deck cargo shipped by the charterer and jettisoned. It was vainly

contended, in opposition to this, that the words "at merchant's risk" had reference solely to the liability of the ship-owner as carrier, and did not apply to a claim for general average contribution, which is not a risk to which the ship-owner is exposed as carrier, but one to which he is exposed as owner of the ship in common with the owners of the cargo.

INFANT—RIGHT TO CUSTODY OF ILLEGITIMATE CHILD.

In the *Queen v. Nash*, p. 454, the Court of Appeal enforced the natural right of a mother of an illegitimate child to its custody. Jessel, M.R., says:—"In a reported case, Maule, J., a very eminent judge, is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed to think that this was said ironically—but if not, the judge, in making the observation, must have been referring only to the strict legal rights as to guardianship. In many cases the law recognizes the right of a mother to the custody of her illegitimate child . . . The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child."

In 8 P. D. 21-101, the great majority of cases are admiralty cases, and none of them seem sufficiently applicable to law in this country to need notice. It may be mentioned that among them is the case of *Dean and others v. Green*, wherein the contumacious rector of Miles Platting was at length awarded a writ of deliverance on the ground that, much against his will, he had, during his imprisonment, "obeyed" the order of the Court to abstain from the ministration of his sacred office. In the May number of the Chancery Division the first case is *Great Western Ry. Co. v. Swindon, etc. R. Co.* p. 677.

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STATUTORY CONSTRUCTION—SPECIAL RAILWAY ACTS.

This is concerned with the interpretation of the special Act of the defendant company, and does not seem to illustrate any general principle of law, or to require any notice here further than as regards the words of Bowen, L. J., at p. 713, which it may be useful to call attention to. He says:—"It seems to me that the greatest injustice might be done if general rules of construction, which are useful enough for interpreting General Acts of Parliament drawn with great care, were rigorously applied to clauses stuck into a railway bill at the last moment when the bill is before a committee. We must not close our eyes to the well known course of proceeding in these matters. These sections in Railway Acts, as every one knows perfectly well, are often drawn by business men or their counsel at a moment's notice, and must not be read as if they were carefully framed clauses deliberately drawn by a conveyancer."

TRUSTEE—LOSS OF TRUST FUND—NEGLIGENCE.

The case of *In re Speight, Speight v. Gaunt*, p. 727, illustrates the duties and liabilities of trustee in dealing with the trust estates. The facts, put briefly, were, that a trustee, acting perfectly *bona fide*, and wishing to invest trust moneys on certain corporation debentures, as he was empowered to do, employed a broker to purchase the debentures. On the broker bringing him a bought note, and asking for the money, he handed it over to the broker in accordance with what appeared on the evidence to be the usual custom. The broker, as a matter of fact, never bought the securities, but shortly after became insolvent, and made off with the money. The question was, whether the trustee was liable to make good the loss. The Court of Appeal, reversing Bacon, V. C., held that he was not. Certain passages may be quoted from their judgments in which they enunciate the principles of law governing such cases. Thus Jessel, M. R., says:—"It seems to me, on general principles, a trustee ought to con-

duct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, the trustee is not bound because he is a trustee, to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own . . . If a trustee has made a proper selection of a broker, and has paid him the money on the bought note, and, by reason of the default of the broker the money is lost, it does not appear to me, in that case, the trustee can be liable." Later on, at p. 746, he says:—"My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words you are not to exercise your ingenuity for the purpose of finding reasons for fixing a trustee with liability; but you are rather to avoid all such hypercriticism of documents and acts, and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him." Again, Bowen, L. J., says:—"Now, with regard to the law, it is clear that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man of business would conduct his own . . . A trustee cannot, as everybody admits, delegate his trust. If confidence has been reposed in him by a dead man, he cannot throw upon the shoulders of somebody else that which has been placed upon his own shoulders. On the other hand, in the administration of a trust a trustee cannot do everything himself, he must, to a certain extent, make use of the arms, legs, eyes, and hands of other persons, and the limit within which, it seems to me, he is confined, has been described

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throughout, both in the cases which have been referred to and the judgments which have preceded me, to be this—a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so.”

EXECUTOR—DEVASTAVIT—STATUTE OF LIMITATIONS.

Passing by a number of cases under the bankruptcy law, *In re Gale, Blake v. Gale*, p. 820, is reached of which it needs only be said that it illustrates the rule that a demand against executors, in respect of a devastavit, is barred after a lapse of six years.

SHARES—BLANK TRANSFER PLEDGE.

The next case requiring mention is *Francis v. Clark*, p. 830. There the registered holder of shares in a company, whose articles of association did not require that a transfer of shares should be made by deed, deposited the certificates of his shares, accompanied by a transfer executed by himself, but with the name of the transferee and the date of the execution left in blank, with a person who advanced him money as security for the loan. No time was fixed for the repayment of the loan, and nothing was said as to the object of the transfer. Fry, J., held the deposittee had no authority, without a previous demand for repayment of the loan, to sell or sub-mortgage the shares, and fill in the name of the purchaser or sub-mortgagee as transferee. In his judgment he says:—“On principle I am unable to see why the deposit should confer a power of sale. As a general rule the pawnee of chattels has no right to sell them unless a time was originally fixed for their redemption, and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due to him. The law is thus laid down by Mr. Justice Story in his book on the Law of Bailments, (7th ed. plac. 308):—“If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and if the pawnor neglects or refuses to comply, the pawnee may, upon due demand and notice to the pawnor,

require the pawn to be sold. I can see no reason why the principle which applies to a pledge of physical chattels should not equally apply to a pledge of a chose in action.”

CONTRACT AS TO CHATTELS—SPECIFIC PERFORMANCE—INJUNCTION.

The last case to be noticed is *Donnell v. Bennett*, p. 855. In this case there was a contract for the sale of chattels to the plaintiff, containing an express negative stipulation not to sell to any other manufacturer, and the court granted an injunction to restrain the breach of the negative stipulation, although the contract was one of which specific performance would not have been granted. Fry, J., says:—“It appears to me that the tendency of recent decisions is toward this view—that the court ought to look at what is the nature of the contract between the parties; that if the contract, as a whole, is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that, in my judgment, that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.” And after referring to some of the cases, he says: “That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract.” This concludes the May numbers of the Law Reports.

A. H. F. L.

FENCE LAW.

SELECTIONS.

FENCE LAW.

At common law in England, no one was obliged to fence his land, except by force of prescription or contract. A person owning cattle must keep them on his own land at his peril, and is liable for damages caused by them if they escape; but he may confine them in any way he chooses. No one need take any precautions to prevent cattle from adjoining close from trespassing on his own land. The want of a fence is no objection to recovery for damages done by animals, except as it is made so by statute, contract or usage.¹ This doctrine of the common law of England is recognized as the common law of Maine, New Hampshire, Vermont, Massachusetts, New York, New Jersey, Delaware, Maryland, Indiana, Kentucky, Michigan, Minnesota, and perhaps some other States.² In several States this rule of the common law is not in force, and the owner of cattle is not obliged to confine them to his own property, but the occupant of land must, at his own peril, keep them out. This is the rule in Ohio, California, North Carolina, South Carolina, Georgia, Missouri, Mississippi, Texas, and Colorado.³ In these States, if he does not properly fence his land, the owner can not recover for damages done his property by his neighbour's cattle, but is himself liable to the owner of cattle for any injury they may receive on his premises, the same as if they entered with his permission. In Pennsylvania, Iowa, and Illinois, a rule midway between these two has been established. It is no trespass for cattle to enter on any unfenced lands; but the owner can not recover damages for injuries to his cattle caused by straying on another's land.⁴

The reason for not adopting the common law rule in many of our States are well given in the case of *Seely v. Peters*.⁵ In this case the court says:—"However well adapted the rule of the common law may be to a densely populated country like England, it is surely but ill-adapted to a new country like ours. If

the common law prevails now, it must have prevailed from the earliest settlement of the State, and can it be supposed that when the early settlers of this country located upon the borders of our extensive prairies, they brought with them, and adopted as applicable to their condition, a rule of law requiring every one to fence up his cattle? That they designed the millions of fertile acres stretched out before them to grow ungrazed, except as each purchaser from the government was able to inclose his part with a fence? This State is unlike any of the Eastern States in their early settlement; because, from the scarcity of timber, it must be many years yet before our extensive prairies can be fenced, and their luxuriant growth, sufficient for thousands of cattle, must be suffered to decay where it grows, unless settlers upon their borders can be permitted to turn their cattle upon them." In accordance with this reasoning, we find that, as a rule, with several exceptions, however, in the newer States and Territories, and those adapted for grazing, either by the decisions of the courts or by statutes, cattle are allowed to range at will, and those cultivating the ground must fence their possessions to keep them out.⁶ In Utah, while, by the general law owners of cattle are liable for damages for trespassing on another's land, whether fenced or not, yet the inhabitants of any district may, by vote, allow cattle to range at large, and require owners of cultivated fields to fence them up.⁷ In most of the States the subject is regulated by statute.

In nearly all the States statutes have been passed concerning the building and maintenance of division fences on the boundary line between adjoining proprietors, and providing generally, that when the owners of the two estates can not agree, application may be made to fence viewers, who shall decide the disputed questions. These statutes generally provide what shall be considered a sufficient and lawful fence.

The object of fencing is to provide against damage caused by or to domestic animals properly restrainable by a common fence. One is not obliged to fence against such small animals as would pass through or under an ordinary fence, nor against such wild animals as would break through. If an animal breaks

1. 20 Edw., IV. 20.

2. *Harlow v. Stinson*, 60 Me. 347; *Lyon v. Merrice*, 105 Mass. 71.

3. *Cleveland, etc. R. Co. v. Elliott*, 4 Ohio St. 474; *Comtrford v. Dupuy*, 17 Cal. 308.

4. *North Penn. R. Co. v. Rehaman*, 49 Pa. St. 101; *Wagner v. Bissell*, 3 Iowa 396; *Stoner v. Skugart*, 45 Ill. 76.

5. *Seely v. Peters*, 5 Gilw. (Ill.) 130.

6. Colorado, *Morris v. Fraker*, 5 Colo. 425; Montana, Code Sts. 373, sect. 1; Nebraska, Comp. Sts. 49, sects. 19, 21; Washington Territory, Code, sect. 2590; Nevada, Comp. Laws, 3902, 3904.

7. Comp. Laws, chap. 3, sects. 1, 2.

FENCE LAW.

through a sufficient fence, and trespasses on another's land, the owner is liable for the damage done by it,⁸ and can not recover for any injury suffered by the animal in consequence of such trespass.⁹ It was held in Missouri, that when a wild buffalo bull breaks into a close, the owner of the premises may kill him if necessary to protect his property from destruction, although the land was not fenced in the manner required by statute.¹⁰ It is, however, ordinarily not lawful to kill animals trespassing on one's own land.¹¹ The owners of unclosed land may drive off trespassing cattle into the highway, and are not liable for injuries they may afterwards receive.¹² The owners of cats or dogs can not at common law be held responsible for trespasses committed by them.¹³

The obligation to fence applies only in favour of animals lawfully on the adjoining lands. Therefore, if an animal trespassing on the land of another, breaks through a defective fence from such land onto the premises of a third person, the owner can not recover damages from such third person, although he is bound to keep the fence in repair.¹⁴ The public have no rights in a highway, except the right to pass and repass thereon. Therefore, cattle left to graze on the highway are not lawfully there; and if they escape through a defective fence onto adjoining lands, their owner cannot recover for damages received by them: nor can he avail himself of the defect in the fence in an action brought against him by the owner of the land for damages sustained by him.¹⁵

A person who is legally bound to maintain a fence, can not recover damages caused by its defect. Where two persons own adjoining lands, separated by a division fence, one part of which one owner is bound to repair, and the remainder the other is to maintain, neither party can recover damages occasioned by reason of a defect in his own part of the fence, but may collect for damages occasioned by cattle breaking through his neighbor's part, although his own is equally defective.¹⁶ If no particular part of the division fence belongs to either party to maintain, in Maine

and Connecticut, no damages can be recovered on account of trespass by reason of defect or absence of a fence.¹⁷ In other States, however, either party could recover, under the common law rule, that owners of cattle must in some way keep them at home or be responsible for damage caused by them.¹⁸

An agreement to maintain a fence on a boundary line is irrevocable, except by mutual consent, or in some manner provided by statute.¹⁹ A covenant in a deed of lands, to maintain a fence between the granted premises and the remaining land of the grantor, runs with the land, and is an incumbrance on the grantor's land.²⁰ A person who is bound to erect a division fence, may build half of it on the land of the adjoining owner,²¹ and he has also a right to enter upon his neighbour's land if necessary to erect such fence, and to remove materials and tools used in building.²² In England, however, it seems that a person building a division fence must build it entirely on his own land.²³ A fence when erected is part of the freehold.²⁴ Therefore if a man build a fence on his neighbour's land, it becomes the property of the owner of the land on which it was built. But it has been held that if a fence intended to make a division line is by mistake erected on another line, it may be removed to the true boundary within a reasonable time after the mistake is discovered.²⁵ This is also generally provided for by statute.

The law concerning railroad fences does not materially differ from that of ordinary fences except as it is changed by statute. At common law, a railroad company, like any other owner of land, is not obliged to fence. Therefore, when the common law rule is in force, an owner of cattle injured while trespassing upon a railroad track, can not recover without proof of negligence on the part of the company.²⁶ In most of the States, railroads are obliged by statute to fence their land. In England, and in Vermont, New Hampshire, and Massachusetts, the benefit of these statutes is confined to the owners of animals lawfully on the adjoining land, and a railroad

8. *Rice v. Nagle*, 14 Kan. 499.

9. *Morrison v. Cornelius*, 63 N. C. 346.

10. *Candfox v. Crenshaw*, 24 Mo. 199.

11. *Clare v. Kiliker*, 107 Mass. 406; *Johnson v. Patterson*, 14 Conn. 1.

12. *Humphrey v. Douglass*, 11 Vt. 22.

13. *Blair v. Forehand*, 100 Mass. 140.

14. *Lawrence v. Coombs*, 31 N. H. 331.

15. *Stackpole v. Hoaly*, 16 Mass. 33; *Holliday v. Marsh*, 3 Wend. 141.

16. *Shepherd v. Hoes*, 12 Johns. 433.

17. *Gonch v. Stephenson*, 13 Me. 371; *Studwell v. Rich*, 14 Conn. 292.

18. *Thayer v. Arnold*, 4 Met. 589; *Lohnyon v. Voing*, 3 Mich. 153.

19. *York v. Davis*, 11 N. H. 241.

20. *Bronson v. Coffin*, 108 Mass. 175.

21. *Newell v. Hill*, 2 Met. 180.

22. *Carpenter v. Harsay*, 57 N. Y. 657.

23. *Vowles v. Miller*, 3 Taunt. 138.

24. *Brown v. Budget*, 31 Iowa 138.

25. *Martin v. Calhoun*, 44 Mo. 368.

26. *Housatonic Ry. Co. v. Knowles*, 30 Conn. 313.

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company is not liable to others, unless the injury resulted from the willful or negligent acts of the company or its servants.²⁷ In most States, however, the benefit of the statutes is extended to all owners of animals. Although fences and cattle-guards have been erected, and are maintained as required by law, yet the company is liable for its negligence and wilful acts, subject to the same rules as other parties guilty of negligence.²⁸

It has been stated that contributory negligence on the part of the plaintiff, is no defence in an action against a railroad company for injury to animals; the want of a proper fence being proved. This probably means that a person is not obliged to forego the use of his land in consequence of the neglect to fence on the part of the company, and the owner may recover if he turns his animals into his field, although he knows it is unfenced and they are liable to be injured.²⁹ A person who wilfully turns his cattle on a railroad track, can not recover for their injury.³⁰ If the owner of land adjoining a railroad carelessly leaves a gate open through which his cattle stray out onto the track, the company is not liable.³¹ When a proper fence has been erected along the road, it is the duty of the adjoining proprietors to notify the company of a defect in the fence, when they know of such defect. If they fail to do so they cannot recover for injuries received by reason of such defect, unless it was known by some agent of the road whose duty it was to communicate notice of it to the officer having charge of such matters.—*Central Law Journal*.

27. *Exanes v. Salem & Lowell Ry. Co.*, 98 Mass. 560.
 28. *Illinois Central Ry. Co. v. Middlesworth*, 46 Ill. 495.
 29. *Shepard v. Buffalo, etc. Ry. Co.*, 35 N. Y. 642.
 30. *Cortwin v. N. Y. etc. Erie Ry. Co.*, 13 N. Y. 42.
 31. *Indianapolis Ry. Co. v. Skinner*, 17 Ind. 295.
 32. *Potter v. N. Y. C. Ry. Co.*, 16 N. Y. 476.

REPORTS

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ATTORNEY-GENERAL V. EMERSON.

Imp. O. 31, r. 13—Ont. r. 228—Discovery—Affidavit on production.

The Court will not accept the statement of a defendant in his affidavit on production that certain documents, which are in his possession and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plaintiff's case or impeach the

defence, but will order such documents to be produced, if, from the whole of the defendant's answer or from the description of the documents given by the defendant, the Court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents.

[C. A.—L. R. 10 Q. B. D. 191.

Per BRETT, L. J.—“The rule which we are laying down is, no doubt, the rule which was applicable to the former proceedings in the Court of Chancery, but it seems to me that it is equally applicable to the affidavit which claims protection from the production of documents under the orders and rules of the Judicature Act.”

Per LINDLEY, L. J.—“I am of the same opinion.”

[NOTE.—With this case compare *Ponsonby v. Hartley*, W. N. 83, p. 13; S. C. in *App. ib. p. 44*.

RAYMOND V. TAPSON.

Imp. O. 37, r. 4—Ont. Rule 285—Witnesses—Evidence.

[C. A.—L. R. 22 Ch. D. 430.

This rule must not be read as restrictive, as though it had abolished (although it does not refer to it) the old practice as to subpoenaing witnesses without the leave of any court. It plainly was intended to be an enabling clause to provide for the taking of evidence in cases where the ordinary practice did not provide for it, and it gave the court power to take evidence, and the examiner to take evidence *de bene esse* when, for the moment, the cause was not at issue, and you wanted evidence for the hearing and in like cases.

HARRIS V. JENKINS.

Imp. O. 27, r. 1—Ont. Rule 178—Pleading—Embarrassing statement of claim.

In an action to restrain the obstruction of an alleged private right of way, the plaintiff ought to show in his statement of claim whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the *termini* of the way and its course. If the plaintiff omits to do this his statement of claim is embarrassing, and the Court will order it to be amended.

[L. R. 22 Ch. D. 481.

FRY, J.—“Otherwise the defendant might be seriously embarrassed. He might come to the trial with witnesses prepared to prove that the

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user of the way had been for less than the legal period of prescription, that it had been a user *clam*, or by permission, and then he might find that the plaintiff claimed the right under a grant. I think the defendant is entitled to a short statement by the plaintiff, of the title by which he claims. The right is a legal conclusion from certain facts, and those facts ought to be shortly stated in the pleading."

COOKE V. THE NEWCASTLE, ETC., WATER CO.

Imp. J. A. 1873, ss. 57, 58; O. 39, r. 1, 136, r. 34—Ont. J. A. ss. 48, 49, Rules 307, 281—Referee—Report to judge—Application to set aside.

Application to set aside the findings of a referee appointed under the former of the above sections to try the issues of fact in an action, and report to the judge making the reference, must be made to a Divisional Court and not to the judge ordering the reference, as such findings are, by the latter of the above sections, equivalent to the verdict of a jury, and can only be set aside by the Court. Ont. Rule 281 confers no such power upon the judge ordering the reference.

Quære, whether the time for making the application runs from the time when the report is made to the judge.

[L. R. 10 Q. B. D. 332.

FRY, J.—"The report of the referee stands, in my opinion, precisely upon the same footing (as the verdict of a jury). It is in truth merely his written verdict upon the facts referred to him for trial, and is by no means to be looked upon as a report to be adopted or not according to the views of the judge before whom the case is in course of trial."

As to the time for moving to set aside the findings:—

FRY, J. [after referring to *Sullivan v. Revington*, 28 W. R. 372, see Maclellan's J. A. p. 263.] "In the case of a verdict, the time for moving against it ordinarily begins to run from the day on which the verdict is delivered. But in the case where the referee is to report his finding to the judge, it would at least seem reasonable that the time should not begin to run until the day on which the report is so made; for until then the referee cannot be said to have finally and irrevocably exercised his jurisdiction; up to that time he may reconsider the evidence as much and as often as he sees fit. It is only the report to the judges which is equivalent to a verdict, and it stands to reason that no motion can be

made to set it aside until the report has been made."

As to what may be urged why judgment should not be given on further consideration after report:—

FRY, J.—"Should I be of opinion that the referee has exceeded his jurisdiction, either in his findings or in any other respect, I shall reject all such unwarranted findings and conclusions, and treat them as though they had never been embodied in the report at all. Such objections as that the report is imperfect, or that it is in excess of jurisdiction, may clearly be urged on the hearing on further consideration as grounds why judgment should not be given for the plaintiff who is applying for it: see *In re Brook, Sykes v. Brook*, 50 L. J. (Ch.) 744."

IN RE NEW CALLAO.

Imp. O. 58, rr. 3, 15—Ont. J. A. s. 38—Informal notice of appeal.

[L. R. 22 Ch. Div. 484.

A petition for winding up a company having been dismissed, the petitioner's solicitors wrote a letter to the company's solicitor urging him to get the order drawn up, adding, "as we are advised and intend to give notice of appeal." No formal notice of appeal was given till the time allowed had elapsed, when the petitioner gave a supplemental notice of appeal.

Held, that the letter could not be treated as an informal notice of appeal, and therefore the appeal was too late.

DAWSON V. FLEESON.

Imp. O. 53, r. 4, O. 59, r. 1—Ont. Rules 407, 473—Short notice of motion—Power of court to disregard irregularities.

Where a party applies for a special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. But in a case where short notice of a motion had been irregularly applied for and served, but the party served had not been injured by the irregularity, the Court exercised its discretion under *Imp. O. 55, r. 1*, (*Ont. Rule 473*), and disregarded the irregularity and heard the motion on the merits.

[C. A.—L. R. 22 Ch. D. 504.

Per JESSEL, M.R.—"Nothing can be more distinct and valuable than the first rule of *O. 59*,

(Ont. Rule 473), which enables the Court to do justice without regard to technicalities."

JOY V. HADLEY.

Imp. O. 31, r. 21—Ont. Rule 237—Order for discovery—Service—Attachment.

[L. R. 22 Ch. D.]

In an action for the specific performance of an agreement by the defendant to sell two leasehold houses to the plaintiff, judgment for specific performance was given, and an order was afterwards made that the defendant should, within four days after service of the order, produce to the plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power," relating to the property.

Held, under the above rule, service of this order on the defendant's solicitors was sufficient service to found an application to attach the defendant for disobedience of the order.

NICHOLS V. EVANS.

Imp. O. 30, rr. 1, 4, O. 55, r. 1—Ont. Rules 215, 218, 428—Payment into court in satisfaction—Costs.

Imp. O. 30 (Ont. O. 26), applies only to an action which is strictly brought to recover a debt or damages. If an account is claimed the order does not apply, and, even if the plaintiff accepts in satisfaction of his whole cause of action a sum paid into Court by the defendant, the Court has a discretion as to the costs.

[L. R. 22, Ch. D.]

FRY, J.—"In my judgment the order applies, as is shown by Rule 1, only to a case in which the plaintiff is strictly seeking to recover a debt or damages, where the whole demand applies to money. If the plaintiff seeks an account it is impossible to satisfy that demand by any specific payment of money. I think, therefore, that the Court has, in the present case, a discretion as to the costs."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Osler, J.]

PERE ADAMS V. THE CORPORATION OF THE TOWNSHIP OF EAST WHITBY.

Closing travelled road—Other convenient access to lands—Onus of proof—Dedication.

The power of a municipal council to close up a road under sect. 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only; and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed.

The onus of showing that another convenient road is open to the applicant, is upon the corporation.

The corporation of East Whitby, by by-law, closed up an old travelled road whereby the applicant was shut out from ingress to his lands, except by a short road leading to the original road allowance which was now for the first time opened. For some years prior to 1844, the short road was used as a private road, for the convenience of persons going to one F.'s place, mills, brewery and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention was made of it in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road was closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed.

Held, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof, sufficiently showed the intention to dedicate the short road to the public; that the applicant had therefore another convenient way to his lands, and that the by-law should not be quashed; but, under the circumstance, without costs.

CHANCERY DIVISION.

Proudfoot, J.]

[May 22.]

JENKINS V. THE CENTRAL ONTARIO RY.

*General Railway Act—Compulsory purchase—
Mines—R. S. O. c. 165, s. 20, subs. 23.*

Motion for injunction. Where the Special Act of a certain railway incorporated the claims of the General Railway Act relating to powers, plans, and surveys, and lands and their valuation, and also authorized the company from and out of the ores obtained *along their line of railway*, to manufacture iron and steel for their own use, and also gave them power to *acquire mining properties by purchase*; and where the company had chosen a site for a station upon the lands of the plaintiffs, covering a valuable mine of magnetic iron ore, and called upon the plaintiffs to arbitrate, and the plaintiffs were unwilling to part with the land.

Held, the plaintiffs could not obtain an injunction restraining the company from expropriating the land in question, even though it were conceded that the company knew of the mine, and that it was the property of the plaintiffs; for the legislature had not seen fit to impose any limitations on the right of the company in locating their line, where there were mines, by giving only a right of way over the surface or otherwise, but had left the expropriation clauses to their full effect, which, in this country, at least, enables the company to acquire the fee of the land.

Aliter, if it were proved that the company were acquiring the land not for the purposes for which the powers of compulsorily acquiring it were given, but for some collateral object, as, for example, with the object of afterwards selling it to a third party.

Semble, should it afterwards appear that such a scheme was actually in contemplation, and hereafter carried out, means might probably be found to prevent it.

Semble also, the powers conferred on the County Judge under the Railway Act of Ontario, R. S. O. c. 165, sect. 20, subs. 23, of ordering immediate possession, before arbitration had, do not exclude the jurisdiction of this Court to enjoin the taking of possession, if the railway company is making use of their powers to attain any object collateral to that for which it was incor-

porated; but if it is not proved that the company is exercising its powers for an unauthorized object, it is not within the jurisdiction of a judge of this Court to interfere with an order for immediate possession granted by a County Judge, though granted *ex parte*.

C. Moss, Q.C., for the plaintiffs.

— for the defendants.

PRACTICE CASES.

Cameron, J.]

[October, 1882.]

ONTARIO & QUEBEC RAILWAY CO. V. GRAND TRUNK RAILWAY CO.

Railway Company—Construction of line—Powers under act of incorporation.

Upon an application for the appointment of arbitrators to determine the compensation to be paid by the O. & Q. Ry. Co. for crossing the railway of the G. T. Ry. Co. at a point near the Carlton station of the latter company, it was objected by the G. T. Ry. Co. that the O. & Q. Ry. Co. are only authorized by their Act of incorporation to build or construct their railway eastward from the City of Toronto, that the Carlton station of the G. T. Ry. is about three miles north-west of the City of Toronto, that the O. & Q. Ry. Co. have not determined the point in Toronto where the western terminus of the railway shall be, and until that is done the company cannot exercise a right of crossing the G. T. Ry. with a view to uniting its line with the C. V. Ry., which is what it contemplates doing.

Held, that there can be no valid objection to the O. & Q. Ry. connecting their line at any point on the C. V. Ry. within the County of York, with the C. V. Ry. without reaching or touching directly the City of Toronto except through such connection.

H. Cameron, Q.C., and G. T. Blackstock, for the O. & Q. Ry. Co.

W. Cassels and C. A. Brough, for the G. T. Ry. Co.

Cameron, J.]

[Jan. 31.]

BLAINEY V. McGRATH.

Partnership—Costs—R. S. O. ch. 15.

The plaintiff and defendant entered into a partnership to furnish G. and H. with certain staves for the price of \$2,000. The contract was not

fulfilled and the plaintiff subsequently brought an action, and obtained a reference to take an account of the partnership dealings. The report found *inter alia* that the plaintiff had contributed to the partnership capital \$87.39, and the defendant \$233.89, and that there was due from the defendant to the plaintiff \$43.74.

The taxing officer taxed the plaintiffs costs under the lower scale on the ground that the case came within Con. Stat. ch. 15, sect. 34, sub-sec. 1.

On appeal CAMERON, J., reversed the taxing officer's ruling.

Nelson, for the plaintiff (appellant).

McMichael, Hoskin and Ogden, contra.

Mr. Winchester.]

[May 3.

BEATTY v. CROMWELL.

Action on foreign judgment—Jurisdiction of foreign court.

An action on a foreign judgment obtained in the State of Massachusetts, U. S. A.

3rd defence.—That the defendant was not, at the commencement of the action or at any time previous to the judgment, resident or domiciled within the jurisdiction of the said Court, or within the jurisdiction of the U. S. A., or a subject of the U. S. A., that the defendant was not served with a process in the action, nor did he appear, nor had he before the recovery of the judgment any notice or knowledge of any process, nor had he any opportunity of defending himself.

The 4th defence was a defence to the original cause of action.

The defendant, in his examination, admitted that he had heard of some claim being made by the plaintiff on which judgment was obtained, (through his brother, who lived in the United States, writing to him about it), and that he wrote to his brother if there was any necessity to employ some one who knew more about it than he did, and that he thought his brother wrote to him informing him that he had got some one to attend to it, and that he sent a statement of the matter to his brother as set forth in the defence put in by Stetson and Green, lawyers. He stated that he was never served with any notice of the action having been brought in any way whatever, and never heard of the trial being about to take place, and never dreamt or heard of it till

after judgment had been entered against him; that he has been living in Canada for the last six years, and out of nineteen years previous to that he only spent a year and a half in the United States. He also admitted that a portion of his estate in Mass. had been attached to pay the judgment.

A. Cassels, for the plaintiff, moved to strike out the 3rd and 4th defences on the ground that the 3rd defence is, in its material parts, bad, and that both are embarrassing.

Shepley shewed cause.

Motion refused following *Schibsy v. Westenhols*, L. R. 6 Q. B. 155, and *Fowler v. Vail*, 27 C. P. 417, and 4 App. 267.

Mr. Dalton, Q.C.]

[May 15

MCCREADY v. HENNESSY.

Security for costs—Costs of application for.

An action for goods sold and delivered. Security for costs was ordered on the ground that the plaintiff's residence was out of jurisdiction; although the writ of summons did not state the plaintiff's residence, it was admitted, on the return of the motion, that he lived in Montreal.

The costs of the defendant's application for security were ordered to be costs to the defendant in the cause, the Master holding that it is necessary to endorse the plaintiff's residence on the writ when he is out of the jurisdiction. If the plaintiff's residence had been so endorsed an order would have issued on *præcipe*, of which the plaintiff would have had no costs, so neither can he have any costs of this motion, as might be the case if costs of this application were made costs in the cause generally.

Clement, for defendant.

Aylesworth, for plaintiff.

Mr. Dalton, Q.C.]

[May 17.

KEMPT v. MACAULAY.

Mortgage—Assignment—Costs—Contribution.

An action for foreclosure of a mortgage. After judgment the defendant V., the owner of the equity of redemption, paid principal, interest, and costs, and took an assignment of the judgment and mortgage.

A writ of *fi. fa.* was issued, endorsed to levy one-half the costs from V.'s co-defendant M., the mortgagor,

[Prac. Cases.]

NOTES OF CANADIAN CASES.

[Prac. Cases.]

Held, that V. having, by means of the assignment, released his own estate from the charge upon it, had no remedy against any one for the money he had paid except against one E. who, in assigning to him the equity of redemption, covenanted against encumbrances.

Shepley, for the motion.

Watson, contra.

Mr. Dalton, Q. C.]

[May 26.]

WESTERN CANADA L. AND S. CO. V. DUNN.

Ejectment—Infant defendant—Sale of lands

The chancery rule by which defendants, in an action for foreclosure of a mortgage, may obtain a sale instead of a foreclosure, will not, even when the defendants are infants, be extended to actions of ejectment.

Lefroy, for the plaintiffs.

Clement, for the official guardian representing the infant defendants.

Mr. Dalton, Q. C.]

May 30.

BOYD V. McNUTT.

*Erasures and interlineations in affidavits—
Rule 468 O. J. A.*

Upon a motion for leave to sign final judgment under Rule 80 O. J. A. objection was taken by the defendant to the affidavit upon which the motion was based, on the ground that in the clause that the plaintiff was informed and believed that an appearance had been entered for the defendant—the word “defence” had originally stood instead of “appearance,” that the former word had been erased and the latter interlined above it, and that such erasure and interlineation had not been initialed by the commissioner before whom the affidavit was sworn.

The Master in Chambers *held*, under Rule 468 O. J. A., that the affidavit could not be read, but enlarged the application for two days, giving the plaintiff leave to withdraw the affidavit from the files, and to re-file it when re-sworn.

Aylesworth, for the plaintiff.

H. J. Scott, for the defendant.

Mr. Dalton, Q. C.]

[June 1.]

O'BRIEN V. BULL.

Interpleader—Final order—Sheriff's costs.

The claimant having succeeded in the trial of an interpleader issue, moved for a final order, bar-

ing the execution creditors, and served notice of the motion upon the sheriff. The sheriff appeared upon the motion and asked for costs. An order was made for the claimant to pay the sheriff's costs of the motion without recourse over to the execution creditors.

Held, that it was unnecessary to serve the sheriff with notice of this motion.

D. E. Thomson, for the claimant.

Aylesworth, for the execution creditors.

Clement, for the sheriff.

Armour, J.]

[June 1.]

GREAT WESTERN ADVERTISING CO. V.

RAINER.

Jurisdiction—Setting off costs.

This was an action in the County Court of the County of Middlesex, to recover the price of work done for the defendant in advertising. The case was tried before the County Judge, without a jury, and judgment was rendered for \$36, no order being made as to costs.

Aylesworth, for the plaintiffs, moved for a mandamus to compel the County Court Clerk to enter up judgment for the plaintiffs without any set off.

J. H. Macdonald, for the defendant, claimed that his client should be allowed to set off the costs incurred by him in the County Court, as according to the amount of the judgment the action should have been brought in the Division Court.

ARMOUR, J., *held*, that costs being in the discretion of the judge, and not having been disposed of at the trial, none can be awarded to either party, and there can be no set off.

Mandamus granted for the County Court Clerk to enter judgment for the plaintiff without costs.

Osler, J.]

[May 25.]

DICKSON V. MURRAY.

Controverted Election Act of Ontario—Particulars—Within what time to be delivered.

This was an election petition respecting the election for the electoral district of the North Riding of the County of Renfrew, holden in February, 1883.

In making an order for particulars, on the application of the respondent, OSLER, J., on May 25, 1883, endorsed the following ruling as to the practice on the draft order: “I think the English

practice as to the time ought to be followed, at all events more nearly than by limiting the party to fourteen days on which to deliver the particulars. The settled English practice is seven clear days, and eight clear days seems to me, making every allowance for distance, means of communication, etc., to be ample; in some case it may be needlessly long, but as a general rule I should say it was sufficient. I refer to the *Hereford case*, *Lenham v. Patterson*, 10 Q. B. 293; *Maude v. Lowley*, 9 C. P. 165; *Beale v. Smith*, L. R. 4 C. P. 145."

The order as finally settled by the learned judge was as follows:—

"It is ordered that the petitioner do, eight clear days before the day appointed for the trial of the petition herein, deliver to the respondent or his agent full particulars in writing, containing, as far as known to the petitioner,

1. The names, places of abode, and occupations of all persons upon whom or with whom the respondent practiced or committed any of the corrupt or illegal acts or practices charged in the petition, together with the nature of such acts or practices, and the times when, or approximate times when, if the exact time be not known, and places where such acts or practices were done or committed.

2. The names, places of abode, and occupations of all persons claimed to be agents of the respondent, who were guilty of any of the corrupt or illegal acts or practices alleged in the petition, together with the nature of each of the said acts or practices, and the times when, or approximate times when, if the exact time be not known, and places where such acts or practices were done or committed.

3. The names, places of abode, and occupations of all other persons who, on behalf of the respondent, are alleged to have been guilty of any of the corrupt or illegal acts or practices charged in the petition, and the nature of each of such acts or practices, together with the times when, or approximate times when, if the exact times be not known, and places where such acts or practices were done or committed.

4. The names, places of abode, and occupations of all persons upon whom, with whom, or between whom such corrupt or illegal acts or practices were done or committed, and the nature of each of such acts or practices, together with the times when, or approximate

times when, if the exact times be not known, and places where such acts or practices were done or committed.

5. And it is further ordered that unless an order be made to the contrary, no evidence shall be received at the trial except as to matters within the said particulars and tending to support the same without the leave of the court or a judge, and upon such conditions as to the postponement of the trial, payment of costs or otherwise as may be ordered.

6. And it is further ordered that the costs of and incidental to this application and order, and consequent thereupon, shall be costs in the cause to the successful party.

Cameron, J.]

[June 6.

MORRISON V. TAYLOR.

Sheriff—Fees—Poundage—Rule 447 O. J. A.—R. S. O. ch. 66.

An execution, and the judgment under which it issued, were set aside on the ground of irregularity in obtaining the judgment.

Held, that the plaintiff was not entitled to have the sheriff's bill against him taxed under sect. 48 R. S. O. ch. 65, as the setting aside of the execution was not a "settlement by payment, levy, or otherwise," within the meaning of the Act or under sect. 47, as the plaintiff was not a person liable on any execution.

Held, however, that a sheriff, as an officer of the Court, claiming fees by virtue of the process, is so far within its jurisdiction that his bill may be taxed under Rule 447, but the appeal as to certain items was dismissed because notice in writing of the items disputed was not given under Rule 449.

Held also, that this case came within the provisions of sect. 45, R. S. O. ch. 66, and that therefore the sheriff was entitled to poundage.

Caswell, for the motion.

Holman, contra.

LAW STUDENT'S DEPARTMENT—CORRESPONDENCE.

LAW STUDENT'S DEPARTMENT.

THE LAW SCHOOL.

The Benchers have re-established the Law School for another year. Whilst we have taken strong ground in favour of the school from time to time, and think that even though the number who take advantage of it is comparatively small, it should be kept up, we would warn the students that its continuance may in the future depend on the way they may show their appreciation of it by their attendance this year. We trust therefore that the numbers may increase.

It is not out of place here to suggest that an occasional lecture at stated periods by some of the older men at the Bar whose experience would enable them to do it with facility and advantage, on some interesting subject connected with the profession, not strictly in the line of dry learning, would be very acceptable and increase the popularity of the school. The students gladly acknowledge the services of some few who have thus given help and countenance to the school and benefitted the students. If some of the leaders at the Bar would hand over a brief once a month or so to a junior, and devote a couple of hours to some such work as this, the very small sacrifice entailed would be of great use to the students, and help towards paying a debt which we conceive they owe to the profession at large.

The examiners appointed are Messrs. Delamere, Armour, Marsh, and W. A. Reeve.

EXAMINATION QUESTIONS.

EASTER TERM, 1883.

SECOND INTERMEDIATE—HONORS.

Equity Jurisprudence.

1. Explain the jurisdiction of Equity to relieve against accident, and illustrate the application of that jurisdiction in cases of (1) lost documents; (2) imperfect execution of powers; and (3) erroneous payments.
2. Explain the jurisdiction of Equity in (1) marshalling of assets, and (2) marshalling of securities.
3. Under what circumstances will a purchaser of real estate (1) be, or (2) be not, bound to see to the application of the purchase money of the real estate purchased by him?
4. Define "Conversion" and "Reconversion," and give illustrations of each.

5. On what grounds will Equity exercise a jurisdiction to rectify a contract?

6. What is meant by "a wife's equity to a settlement?" and shew how the Court deals with such equity in respect of the wife's (1) real and (2) personal estate.

7. Show the maxim "Equity follows the law," in cases arising under (1) the concurrent, and (2) the exclusive, jurisdiction of Courts of Equity.

Broom's Common Law.

1. Explain fully and illustrate the principle that an agreement to oust the Court of Jurisdiction is void? Is there any qualification to this doctrine?

2. Give some instances of *damnum sine injuria*. Define *damnum* and *injuria*.

3. Define the following classes of contracts (1) executed, (2) executory, (3) express, (4) implied.

4. What is meant by mutuality in a contract? Does it always mean mutuality of obligation? Explain.

5. The law, where a contract is executed, requires that a request express or implied should be shewn. In what cases will the request be implied?

6. How far is intoxication of the contracting party a defence to an action brought upon the contract?

7. Define malice in criminal law?

CORRESPONDENCE.

The Judges of the Q. B. Division and the Court of Chancery.

To the Editor of the LAW JOURNAL.

SIR,—It must be apparent to every one attending the sittings of the Divisional Court of Queen's Bench, and also the sittings of single judges of that division, that there appears to be some extraordinary and most unreasonable antipathy existing in the breasts of some at least of the learned judges of that division, at anything and everything savouring of equity jurisdiction and equity principles of procedure. This antipathy vents itself in frequent sneers, sometimes jocular and sometimes ill natured, at the methods and principles against which they entertain such strong prejudices; and even their learned brethren of the Chancery Division do not escape covert censure for their mode of transacting business. This, besides being very un-

CORRESPONDENCE—ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

dignified, and laying the learned judges, who indulge in such foolish displays, open to ridicule and loss of respect, is besides very questionable taste as a matter of mere politeness towards their brethren, and calculated not only to diminish good feeling amongst themselves, but also to lessen in the public respect for the court and its administration, which all judges are deeply interested in maintaining at a high standard. But such carping and cavillings at equity principles and procedure, when directed against the Chancery Division or any of the judges of that division, might just as well be directed against the learned judges of the Queen's Bench Division themselves, since those learned judges are bound by the same rules of procedure or by the same principles of decision as the judges of the Chancery Division. Adverse comments respecting the judges of the Queen's Bench and Common Pleas Divisions are never heard in the Chancery Division; the judges of that division, I presume, having so much more business to transact than the judges of the other divisions, have no time to waste in making sneering or jocular remarks at the expense of their brethren of the other divisions. Perhaps a little more work would be the most wholesome corrective of these ebullitions in the Queen's Bench Division. Apart from the matter I have alluded to, it may not be out of place, with all due respect, to suggest that more work would be done if some of the learned judges were occasionally to let the Bar do more of the talking. Again, the court is a very strong one, and can afford to be merciful, so far as the Bar is concerned, but one at least of its members sometimes makes it hard for counsel to refrain from retorting in a manner which would be more forcible than polite.

Yours truly,

WEST WING.

Toronto, May 31, 1883.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

Stolen negotiable instruments—*London L. J.*, March 24.

Betting through commission agents—*ib.* April 7.

Discovery in ejectment—*ib.* May 5.

Damages done by animals during transit through highways—*Irish L. T.* March 31, *et seq.*

Torts of married women—*ib.* April 14, from *Western Jurist*.

Libels imputing insolvency—*ib.* April 28, from *Justice of the Peace*.

The present condition of legal education—*Law Times*.

Doctrine of *descriptio personae* as applied to bills and notes—*Central L. J.* May 4.

Has a check holder a right of action against a bank—*Central L. J.* April 6.

Evidence of insanity as a defence to murder—*ib.* April 13.

When are trustees chargeable with compound interest?—*ib.*

Illegal contracts—*ib.* April 20.

A rationale of the law of costs—*ib.*

The right of a *bona fide* occupant of land to compensation for his improvements—*ib.*

April 27.

Right of a party when his own witness has made previous contradictory statements—*ib.*

Covenants in leases—Lessor's covenants—*ib.* May 11.

The burden of proof in life insurances cases—*ib.*

Some points of international law—Encouragement of foreign insurrection—Right of search—Contraband—*ib.*

Equities and defences under irregular indorsements—*ib.* May 25.

Club law, particularly as to rights of expulsion and liabilities of members—*Albany L. J.* April 28.

Jurisdiction over estates of the dead—*Am. Law Review*, March, April.

Marriage and its prohibitions—*ib.*

Property relations of religious societies—*ib.*

Priority of demands against decedents' estates—*ib.*

Warranties implied in sales of personal property in the United States and Canada (continued)

—*Am. Law Reg.* April.

Extra territorial jurisdiction of receivers—*ib.* May.

TO OUR READERS.

Please make the following corrections on p. 192 of last number:—

1st col. 10th line from bottom—for "witnesses" read "interest."

2nd col. 9th line from top—for "administer" read "indemnity."

In *Hulton v. Federal Bank et al.*, at p. 193, after the word "principal" add—

Held, that both branches of the claim must be disallowed.

LITTELL'S LIVING AGE. The numbers of *The Living Age* for May 12th and 19th contain Nasmyth's Autobiography, *Quarterly*; The True Character of the Pilgrim Fathers, *British Quarterly*; The Gospel according to Rembrandt, *Contemporary*; An Unsolved Historical Riddle, by J. A. FROUDE, *Nineteenth Century*; The Condition of Russia, *Fortnightly*; The Last Days of a Dynasty, *Temple Bar*; A Visit to Longfellow, *Leisure Hour*; Boys, *Cornhill*; Study and Stimulants, *Spectator*; A New Lake Tritonis, *Saturday Review*; A Chinese Funeral, *Chamber's Journal*; with instalments of "The Ladies Lindores," "No New Thing," "The Wizard's Son," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low, while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, by postpaid. Littell & Co., Boston, are the publishers.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

HILARY TERM, 1883.

During this term the following gentlemen were called to the Bar, namely :—

William Renwick Riddell, Gold Medalist, with honours ; Louis Franklin Heyd, William Burgess (the younger), John Joseph O'Meara, Charles Coursolles McCaul, James Henry, Frederick William Gearing, James Albert Keyes, James Gamble Wallace, Harry Dallas Helmcken, Albert John Wedd McMichael, Hugh D. Sinclair, Christopher William Thompson, Walter Allan Geddes, James Thompson, John William Binkley, Richard Scougall Cassels.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

Graduates—Joseph Nason, Henry Wissler, Robert Kimball Orr, Henry James Wright.

Matriculant—William H. Wallbridge.

Juniors—Joseph Turndale Kirkland, William James Sinclair, Francis P. Henry, Michael Francis Harrington, Thomas Browne, Charles Albert Blanchet, John Hood, Jaffery Ellery Hansford, Albert Edward Trow, Ralph Robb Bruce, Edwin Henry Jackes, William Herbert Bentley, Arthur Edward Watts.

Articled Clerk—William Sutherland Turnbull passed his examination as an articled clerk.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such

Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From	Arithmetic.
1882	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum.
	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
1884.	Ovid, Heroïdes, Epistles, V. XIII.
	Cicero, Cato Major.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
1885.	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic ; Algebra, to end of Quadratic Equations ; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

LAW SOCIETY.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1883 { Emile de Bonnechose, | 1884 { Souvestre, Un
1885 { Lazare Hoche. | philosophe
sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articulated clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

William's Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

FOR CERTIFICATES OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.

Easter Term, third Monday in May.

Trinity Term, first Monday after 21st August.

Michaelmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

The First Intermediate Examination will begin on the second Tuesday before Term at 9 a.m.

The Second Intermediate Examination will begin on the second Thursday before Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Benchers during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees.....	\$ 1 00
Student's Admission Fee.....	50 00
Articled Clerk's Fee.....	40 00
Solicitor's Examination Fee.....	60 00
Barristers " ".....	100 00
Intermediate Fee.....	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions.....	2 00
" Diplomas.....	2 00
" Certificate of Admission.....	1 00
All other Certificates.....	1 00

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JULY 1, 1883.

NO. 12.

DIARY FOR JULY.

1. Sun... *Sixth Sunday after Trinity.* Long vacation begins. Dominion Day. Confederation, 1867.
2. Mon... Co. Ct. term (except York) begins. Heir and Dev. sitt. begin.
6. Fri... Last day for service of notice of Appeal from Ct. of Rev. to County Judge.
7. Sat... County Ct. term (except York) ends. Gen. Sim. coe, first Lieut.-Gov. of U. C., 1792.
8. Sun... *Seventh Sunday after Trinity.* Cyprus ceded to England, 1878.
11. Wed... Canada invaded by U. S., 1813.
14. Sat... W. P. Howland first Lieut.-Gov. of Ontario, 1868.

TORONTO, JULY 1, 1883.

WE are glad to learn that Messrs. Lefroy and Cassels have in an advanced state of preparation, and are about immediately to publish, "Notes of Practice Cases," embracing short references to all Canadian and English decisions and *dicta* having reference to the Judicature Act, subsequent to the annotated editions of Mr. MacLennan, and Messrs. Taylor and Ewart.

ON receiving the Ontario Acts for 1883, the profession will be struck at once by the unusual bulk of the volume. This is partly caused by an elaborately compiled table showing how the text of Harrison's Municipal Manual has been amended by the Consolidated Municipal Act, 1883. This, as we understand, has been compiled by Mr. F. J. Joseph, so well known as the editor of Harrison's Municipal Manual, and also one of the editors of Robinson and Joseph's Digest.

VARIOUS rumours are in circulation at Osgoode Hall as to probable judicial appointments. At present nothing has been decided but it is thought probable that Mr. Justice Cameron may be promoted to the Court of

Appeal. The profession will be glad to see Mr. Cameron appointed to any position which would be pleasant to himself, and there is no position on the Bench which he would not grace by his learning, talents and personal worth.

THIS journal has always endeavoured, so far as it could, to stand up for the interests of the profession and of the public generally, as against the machinations of legal quacks and unlicensed conveyancers. At vol. 18, p. 86, we called attention to enactments in Manitoba and Australia, which aim at putting a stop to this nuisance. All, except the afore-said gentry themselves, will be glad to see that the Chancellor took occasion to speak out on the subject, with judicial calmness and force, in connection with the case of *Dunlap v. Dunlap*, in which he delivered judgment on the 20th inst. The learned Chancellor there says:—"This litigation affords another example of the mischief that arises from the employment of unlicensed persons in that branch of the law which, of all others, is most abstruse and technical. It is unsafe to entrust the preparation of instruments affecting real property to unskilled and unprofessional hands, and one cannot doubt that much bitter contention and many of the disastrous results of family litigation would be avoided if the law in this Province threw safeguards around the practice of conveyancing in some such way as is found efficacious in the Province of Manitoba."

A RECENT *Gazette* announces the appointment of William Davis Ardagh, recently Deputy Attorney General of Manitoba, and before that of the Ontario Bar, as County Judge of

THE LIQUOR LICENSE ACT, 1883.

the Eastern Judicial District of Manitoba. Mr. Ardagh commenced his professional career as a partner in the firm of which the late Hon. John Crawford, afterwards Lieut.-Governor of Ontario, and the present Chief Justice Hagarty, were partners. He was for many years connected with the editorial management of this journal in conjunction with the late Chief Justice Harrison (then at the Bar), and others. We claim to know whereof we speak when we say that the Government has been fortunate in being able to secure the service of one so competent as Mr. Ardagh for the position of County Judge for the judicial district which contains the City of Winnipeg. A sound lawyer of large experience of men and things, a most conscientious, painstaking, and industrious man, of the highest personal character, one who the longer he is known the more he is valued, he will not fail to give satisfaction to all whose opinion is worth having, in his new sphere of duty. We notice that his appointment is favourably spoken of in the Winnipeg papers, where they look forward to his relieving the Superior Court Judges to a considerable extent from the undue pressure of work which has fallen upon them.

THE LIQUOR LICENSE ACT, 1883.

So much has been said lately in the daily papers in respect to the alleged "sad mistake" of the person who drew the Dominion Licensing Act, that it will not be going beyond our province as a legal journal to consider wherein the supposed mistake is said to appear, and to discuss the question in the light of the ordinary rules for the interpretation of statutes. The Municipal Act, (R. S. O. c. 174, s. 74), as amended by the 42 Vict. c. 31, s. 2, Ont., enacts that, "No person who is a license commissioner, or inspector of licenses, or police magistrate, shall be qualified to be a member of the council of

any municipal corporation;" on the other hand the Liquor License Act of 1883, or the McCarthy Act, as it has come to be called, provides (sect. 5) that, "There shall be a Board of License Commissioners, to be called 'the Board,' composed of three persons for each license district—the second commissioner shall be the warden of the county or mayor of the city. When there is both a warden and a mayor having jurisdiction within the license district, the former shall be second commissioner."

Behold, exclaim the objectors, a very palpable blunder. The "second commissioner" is like Kingsley's amphibious animal, which can't live on the land and dies in the water. Under the Ontario Act he can't exist in the municipal council, if he is a license commissioner, while under the Dominion Act he only exists by virtue of being the warden of the county or mayor of the city. We confess that there is a certain plausibility in all this. Let us see, however, whether the position is sustainable from a legal point of view, which is the one by which it must eventually be judged.

Now, no doubt, a statute may be said in a sense to "always speak." The operation of statutes is often extended to matters of subsequent creation: (Wilberforce on Statute Law, p. 166). But there are some modifying rules of statutory interpretation which have to be considered if we wish to discuss these two enactments in a judicial spirit, and from a judicial point of view.

Beyond question, if the objection be rightly taken, a blunder, if not a mischievous absurdity, has been perpetrated by the draftsman of the Dominion License Act. But it is laid down in the books that whenever the language of an enactment admits of two constructions, according to one of which it would be unjust, absurd, or mischievous, and according to the other, reasonable and wholesome, it is obvious that the latter must be adopted as that which the legislature intended: (Maxwell on Statutes, p. 179-180; Hard-

THE LIQUOR LICENSE ACT, 1883.

castle's Statutory Law, p. 29 sq.) And an example is cited which bears some analogy to the case under consideration. A certain by-law authorized the Poulterers' Company in London to fine "all poulterers in London or within seven miles round," who refused to be admitted into their company. The courts held that inasmuch as no poulterer could legally belong to the company who was not also a freeman of the city, the by-law was to be construed as limited to those poulterers who were also freemen: (*Poulterers' Company v. Phillips*, 6 Bing. N. C. 314). If the courts had held otherwise the unhappy poulterer who was not also a freeman would have been in almost as dreary a plight as that in which our "second commissioner" is alleged to be. He could not belong to the company because he was not a freeman, while on the other hand he would be fined for not belonging to the company because he was a poulterer.

Again, no doubt, a Dominion Act cannot in any way be supposed to repeal, or be intended to repeal, a Provincial Act, which is not *ultra vires*; but at the same time the principles on which the courts deal with supposed inconsistencies and repugnancies between two statutes *in eadem materia*, cannot fail to apply to the case of Dominion enactments and Provincial enactments which are supposed to be inconsistent and repugnant. Now it is laid down that if two statutes are inconsistent the greatest care will be taken and their provisions will be most strictly scrutinized before the Court comes to the conclusion that the earliest of the two is repealed by implication: (*Escot v. Martin*, 4 Moo. P. C. at p. 130; *Charlton v. Tonge*, L. R. 7 C. P. at p. 183; *Wilberforce on Statute Law*, p. 318). Not only is repeal by implication not favoured, but any construction involving it is to be rejected in favour of any other which the language will rationally bear: (*Maxwell on Statutes*, p. 134.) Again it is a general presumption that the legislature does not intend to exceed its jurisdiction: (*ib.* p. 118.) Lastly, when the objects of two ap-

parently repugnant Acts are different, no repeal takes place: (*ib.* p. 153).

Let us then, bearing these rules and principles in view, again consider the two enactments under discussion. We say without hesitation no court would hold them to be repugnant. The Ontario Act says:—"No person who is a license commissioner *shall be qualified* to be a member of the council of any municipal corporation." The policy of the enactment is obvious. A license commissioner running for municipal office would have in his hand a great and potent weapon of corruption, no less a potent weapon than alcohol. Beer and the Bible are said to have carried the late Lord Beaconsfield into power, and whiskey without the Bible cannot but have its weight. The McCarthy Act in no way militates against this Provincial legislation. It merely provides that when once a man is established in office as warden of a county, or mayor of a city, he shall be *ex officio* one of the Board of license commissioners. Having, under the protection of the Ontario Act, been elected by the *sober* sense of the municipality to the chief office in its gift, who could be more fitted to legislate in the interests of sobriety and temperance? At all events, the policy which would debar the holder of municipal office from being a license commissioner, would be entirely distinct from that which debars a license commissioner from being a candidate for municipal office. The object of the one enactment is distinct from that of the other. The Ontario enactment aims at preventing a man who holds the position of license commissioner from standing for municipal office. The Dominion Act says that a man who *has attained* a certain municipal office shall be a license commissioner. The objects of the two Acts being different, and the one not interfering with the effectuation of the object of the other, they cannot be considered as inconsistent or repugnant.

LAW SOCIETY.

LAW SOCIETY.

EASTER TERM.—46 VICT., 1883.

The following is the *resume* of the proceedings of the Benchers during Easter Term, published by authority :—

During this term the following gentlemen were called to the Bar, namely—C. L. Mahoney, (with honors), P. D. Crerar (with honors). Mr. Mahoney was awarded a gold medal and Mr. Crerar a silver medal.

The following other gentlemen were called, namely :—Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Edward Poole, W. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gausby, A. D. Kean, David Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine, J. F. Canniff.

The following gentlemen received certificates of fitness, namely :—Messrs. A. J. Williams, R. W. Leeming, C. L. Mahoney, C. G. O'Brian, P. D. Crerar, C. W. Oliver, M. MacKenzie, G. F. Ruttan, R. W. Armstrong, T. A. Snider, A. O. Beardmore, W. H. Brouse, A. D. Kean, L. C. Smith, J. J. A. Weir, C. E. Start, R. M. C. Toothe, A. P. E. Panet, W. H. Hewson, A. D. Howard, T. H. Dyre, W. H. Barry, J. Carruthers, J. B. Hands, J. Lane.

Mr. A. H. Macadams, who passed his examination last term, received his certificate of fitness.

The case of Mr. H. C. Hamilton was referred to the Legal Education Committee for report.

The following gentlemen passed the First Intermediate Examination (with honors) and were awarded Scholarships, namely :—Mr. G. H. Esten, First Scholarship, Mr. C. J. Mickle, Second Scholarship, Mr. A. McLean, Third Scholarship.

The following other gentlemen passed, namely :—Messrs. F. C. Powell, P. McCullough, H. J. Wright, S. Love, H. C. Fowler, W. T. McMullen, James Smith, F. A. Roe, W. N. Irwin, R. Armstrong, H. M. Mowat, E. A. Miller, G. H. Stephenson, A. G. Campbell, J. R. O'Reilly, W. H. Blake, I. F. Grierson, G. E. Burns, R. A. Dickson, E. T. Graham, F. H. Stoddart, M. A. Everetts, Robt. Walker, W. Mickle, W. A. F. Campbell, W. B. Raymond, D. A. Haggart, A. Wilkin, E. W. Boyd, L. C. Raymond, E. M. Henry, J. Baird, T. Bennett.

The following gentlemen passed the Second Intermediate Examinations (with honors) and were awarded Scholarships, namely :—Mr. D. C. Ross, First Scholarship; Mr. J. A. Hutcheson, Second Scholarship; Mr. W. A. Dowler, Third Scholarship. The following other gentlemen passed, namely :—Messrs. G. W. Field, R. V. Sinclair, H. B. Elliott, Jno. Greer, J. Denovan, A. G. Murray, W. M. Brown, T. J. F. Hilliard, W. D. Gwynne, R. Christie, H. G. MacKenzie,

A. Burwash, J. T. Sproule, A. C. D. McIntyre, A. E. Overell, G. C. Thomson, A. C. Muir, J. W. Ryerson, W. C. Livingstone, A. J. Richardson, T. E. Williams.

The following gentlemen were admitted into the Society as Students-at-Law, namely :—

GRADUATES—Robert Franklin Sutherland, Archibald MacDonald Ferguson, Walter Hunter, Calvin Donald Hossack, Ed. Albert Holman, Edmund James Bristol.

MATRICULANTS—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward, H. J. Snelgrove.

JUNIOR CLASS—A. M. Grier, H. I. Cowan, G. H. Douglas, W. E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Clelland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an articled clerk.

May 21st, 1883.

Present :—Messrs. Crickmore, Moss, J. F. Smith, Murray, Irving, Bethune, Leith and S. H. Blake.

The Report of the Reporting Committee on the subject of the Supreme Court Reports was presented by Mr. J. F. Smith. Ordered that it be considered on Saturday, 26th instant.

The Report of the Special Committee on the subject of the formation of a Benevolent Fund was presented by Mr. Murray. Ordered that it be considered on Saturday, 26th instant.

Mr. Murray gave notice that on Tuesday, the 22nd instant, he would move the appointment of a committee to consider and report on the subject of remuneration of Counsel and Solicitors and of preventing unqualified practitioners and conveyancers from receiving remuneration. And that such committee should have power to add to their numbers as well from members of the Society who are not of the Bench as from members of the Bench. And that an appropriation be made from the funds of the Society to defray the necessary expenses of printing, postages, &c., and the travelling expenses of any member of the outside Bar.

Mr. J. F. Smith gave notice that he would on Saturday the 26th instant, move that Trinity Term of this Society, for the year 1883 and thereafter, commence on the first Monday after the 21st September in each year, and that the examinations which should be held in August in this year and each succeeding year be held in the third, second, and first weeks in September instead of in the same weeks in August, and that rule 3 of the rules of the Society be amended accordingly.

Mr. Murray gave notice that he would on Saturday, the 26th instant, move that the meetings and also the examinations in Trinity Term be abolished.

LAW SOCIETY.

Tuesday, 22nd May, 1883.

Present—Messrs. Leith, Martin, Crickmore, Maclellan, S. H. Blake, Foy, Murray, Irving, J. F. Smith, Bethune, Read, Ferguson.

On motion of Mr. Murray in the absence of the Treasurer, Mr. Irving was appointed Chairman.

Mr. Maclellan, in the absence of Mr. Hoskin, the Chairman, presented the Reports of the Discipline Committee in the several matters of, O'Brian *v.* Butterfield; John B. Wood, and Wm. E. Grace.

The Report *re* O'Brian and Butterfield was received and read, ordered for immediate consideration and adopted.

Ordered that the Secretary do transmit copies of the Report to both Mr. O'Brian and Mr. Butterfield and inform them that it was adopted by convocation.

The Report *re* John B. Wood was received and read, ordered for immediate consideration, and adopted.

Ordered that the Secretary do inform Mr. Wood of the conclusion arrived at.

The Report *re* W. E. Grace was received and read, ordered for immediate consideration and adopted.

Ordered that the Secretary do inform Messrs. Grace, Campion and Johnston of the decision in their case.

Moved by Mr. Maclellan, seconded by Mr. Read, and ordered, that the Secretary do inquire and state on Saturday next the name of the Solicitor to whom Mr. H. H. Bolton is now under articles of service; and further, that the Solicitor's attention be called to Mr. Bolton's letter paper, and that he be asked for any explanation he may be desirous of making.

The office of Examiners and Lecturers having become vacant, ordered that the Secretary cause to be published the usual advertisement for four gentlemen to fill the vacant positions, the applications to be in the Secretary's hands not later than 30th May.

Ordered that a call of the Bench be made for Friday, the 1st day of June next, at which meeting the Examiners are to be appointed.

Mr. Read, pursuant to notice, moved that the thanks of Convocation be given to the Treasurer and Messrs. Wicksteed and Irving for the assistance given by them in procuring original copies of the Consolidated Statutes for the Library.

Carried.

Saturday, 26th May, 1883.

Convocation met.

Present—The Treasurer, and Messrs. Leith, Crickmore, Murray, Irving, Moss, J. F. Smith, Robertson, Foy, Cameron, Kerr, Guthrie, and Bethune.

The Minutes of last meeting were read and approved. Mr. Crickmore moved, seconded by Mr. Murray, that Mr. Blake be Treasurer of the Society for the ensuing year.—Carried unanimously.

Ordered that the Chairman of the several standing Committees for last year and Mr. Moss be appointed a Committee to select and report names of members of Convocation for the various standing Committees for the ensuing year.

Mr. Crickmore, from the said Committee, reported the following lists, namely:—

Legal Education.—A. Leith, J. H. Ferguson, C. Moss, J. Hoskin, J. F. Smith, D. Guthrie, T. B. Pardee, J. MacKelcan, J. Crickmore.

Library.—J. Bethune, H. Cameron, J. Beaty, Dr. McMichael, J. H. Ferguson, C. Moss, S. H. Blake, J. Bell, A. Irving.

Discipline.—A. Leith, J. Maclellan, J. Beaty, J. K. Kerr, T. Robertson, H. C. R. Becher, E. Martin, Dr. McMichael, J. Hoskin.

Finance.—J. J. Foy, J. Crickmore, E. Martin, S. H. Blake, L. W. Smith, H. W. M. Murray, W. R. Meredith, A. S. Hardy, D. B. Read.

Reporting.—J. Bethune, B. M. Britton, H. Cameron, F. MacKelcan, D. McCarthy, J. F. Smith, H. C. R. Becher, E. Martin, J. Maclellan.

County Library Aid.—A. Hudspeth, H. Cameron, H. C. R. Becher, W. R. Meredith, T. Robertson, B. M. Britton, A. S. Hardy, E. Martin, J. K. Kerr.

Journals of Convocation.—C. F. Fraser, J. J. Foy, J. Maclellan, T. B. Pardee, J. K. Kerr, J. Hoskin, C. Moss, D. McCarthy, B. M. Britton.

Ordered that the standing Committees do consist of the gentlemen named in the lists reported.

Mr. Murray moved, pursuant to notice, that the meetings and also the examinations in Trinity Term be abolished.

Ordered that the whole questions raised by Mr. Murray's and Mr. Smith's notices be referred to the Legal Education Committee to report at the next meeting of Convocation.

Mr. Murray moved, pursuant to notice, and it was ordered, that a committee composed of Messrs. Leith, Murray, Read, and Irving, be appointed to confer with members of the Bar as to the propriety of extending an invitation to Chief Justice Coleridge on the occasion of his visit to America, and, if thought advisable, to call a meeting of the Bar for the consideration of the matter and for taking such action as may be thought proper.

Mr. Hector Cameron gave notice that he would at the next meeting of Convocation move that no higher or exceptional fee should be charged to persons to be called to the Bar under sub-sections 3, 4 and 5 of section 1 of chapter 139 of the Revised Statutes of Ontario than to those applying for call under sub-section 1 and 2.

The Report of the Legal Education Committee containing the returns of the working of the Law School was presented by Mr. Crickmore.

Mr. Murray gave notice that he would on Friday, the 1st day of June next, move that the Law School as it at present exists be continued for a further term.

LAW SOCIETY.

Friday, June 1st, 1883.

Convocation met.

Present—The Treasurer, and Messrs. MacLennan, S. H. Blake, Moss, Ferguson, Crickmore, Hudspeth, Foy, Irving, Robertson, Leith, MacKelcan, Kerr, Britton, L. W. Smith, J. F. Smith, Murray, Read, Martin, Bethune, Guthrie and McCarthy.

Mr. Crickmore, from the Legal Education Committee, reported on the notices of motion as to Trinity Term referred to that Committee, as follows :

REPORT AS TO TRINITY TERM.

To the Benchers of the Law Society in Convocation.

The Report of the Legal Education Committee upon the reference to them by Convocation as to proposed change in the commencement of Trinity Term, beg to report as follows :—

1. That having regard to the interests of the Students and their course of study and the intermediate examination as well of the students as the articulated clerks, it is expedient that there be as little change as possible in the times of the commencement of the present terms of the Society.

2. That as many of the Benchers have expressed a desire that they should not be required to meet in Convocation during the long vacation in the Courts, which is now extended to the first of September, your Committee have considered that a change of the commencement of Trinity Term from the first Monday after the twenty-first of August to the first Monday in September may be made without causing any inconvenience in the course of study and examinations of the students.

3. Or, Trinity Term may be made to commence on the second Monday in September, and the length of the term shortened to that week.

4. That the usual examinations before Term may, without inconvenience, take place at the same relative times before Term as at present.

Signed, JOHN CRICKMORE.

The Report was read and received, and ordered for immediate consideration.

Mr. Crickmore moved that the meeting of Convocation for Trinity Term do hereafter begin on the first Monday in September, and that the several examinations for that Term be fixed with reference to that day as the first day of the Term. Ordered accordingly.

Mr. Crickmore, from the Committee on Legal Education, reported on the subject of the applications for examinerships.

Mr. Delamere was elected Examiner on Commercial and Common Law. Mr. Armour was elected Examiner on Real Property. Mr. Marsh was elected Examiner on Equity. Mr. Reeve was elected Examiner on Criminal Law, the Law of Torts, and Maritime Law.

Mr. Murray moved, pursuant to notice, that

the Law School be continued for the further term of two years.

Mr. MacKelcan moved in amendment to substitute the words "one year" for "two years." Amendment carried.

The main motion as amended was carried as follows :—

Ordered that the Law School be continued for a further Term of one year.

Mr. MacLennan moved the adoption of the Report of the Committee on Reporting, recommending that the subscription to the Supreme Court Reports be continued for another volume and that twelve hundred copies be ordered, at one dollar and fifty cents per copy.

Mr. Robertson seconded the motion, which was carried.

Saturday 9th June, 1883.

Convocation met.

Present—Messrs. Crickmore, Irving, Meredith, MacKelcan, Bethune, J. F. Smith, Moss, Read, S. H. Blake, Murray and H. Cameron.

In the absence of the Treasurer, Mr. MacLennan was appointed Chairman.

Mr. Murray moved second and third reading of the rule relating to the Law School.

The rule was read a second and third time and passed as follows :—

RULE FOR THE CONTINUATION OF THE LAW SCHOOL.

1. The Law School is hereby continued until the last day of Easter Term, 1884, subject to the rules passed by this Society on the establishment of said School in Michaelmas Term, 1881, as hereby amended.

2. Rule No. 9 respecting the Law School is hereby repealed, and the following substituted therefor :

The Lecturer for the time being who has held the position for the longest period, shall be the chairman of the Law School.

Mr. Smith moved the following rule in accordance with the report of the Legal Education Committee on the subject of Terms, namely :

RULE AS TO TERMS.

Rule 3 shall be repealed, and the following rule substituted therefor :

3. The Terms of the Society shall be the same as provided for by sect. 11 of the Superior Courts of Law Act, except that Trinity Term shall begin on the first Monday in September, and shall end on the Saturday of the following week.

The rule was read a first, second and third time and passed.

Mr. Cameron moved, pursuant to notice, seconded by Mr. Crickmore, that no higher or exceptional fee should be charged to persons to be called to the Bar under sub-sections 3, 4 or 5 of section 1 of chap. 139 of the Revised Statutes of Ontario, than to those applying for Call under sub-sections 1 and 2.

Mr. Moss moved in amendment, seconded by Mr. Blake, that the subject of the motion gener-

Prac. Case.]

BINGHAM V. HENRY—NOTES OF CANADIAN CASES.

[Sup. Ct.

ally be referred to a special committee of Messrs. MacKelcan, Crickmore, Bethune, J. F. Smith, Maclellan, and H. Cameron. Carried.

It was moved by Mr. Crickmore, seconded by Mr. Meredith, and ordered, that a book be procured in which shall be entered all rules of Convocation as the same shall be passed or altered, and those which have already been passed since consolidation, and that it be referred to the Committee on Journals of Convocation and Printing, to carry into effect this resolution.

Convocation adjourned.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

PRACTICE.

BINGHAM V. HENRY.

Practice—Evidence on commission—Professional expert.

[June 7—Mr. DALTON, Q.C.]

In this action, which was brought by certain persons, who were grain dealers and commission merchants, to recover a balance alleged to be due them by the defendant on certain transactions connected with the purchase of corn by the plaintiffs for the defendant in New York, the plaintiffs obtained an order for a commission on interrogatories to New York, to examine, amongst others, one Erastus Cooke, and delivered the interrogatories to be administered to the defendant in accordance with the practice.

The interrogatories were as follows :—

1. By what law are the rights of principal and agent governed in transactions such as those set out in said copy of proceeding, where such transactions are entered into in the City or State of New York?

2. According to said law what are the rights and liabilities and duties of the principal in such transactions where the circumstances are similar to those set out in what is called the statement of claim herein?

3. According to said law what are the rights, liabilities and duties of the agent in such transactions where the circumstances are similar to those set out in said statement of claim?

On June 6, 1883, *Lefroy* moved to strike out the above interrogatories on the ground, among others, that they were evidently addressed to a professional witness, and it was not proper that the evidence of professional men, or experts of any kind, should be taken on commission. Such witnesses should be produced at the trial. He referred to *Russell v. Great Western Ry. Co.* 3 U. C. L. J. 116.

H. J. Scott, contra.

Mr. DALTON, Q.C.—The questions objected to refer to the law of New York State applicable to the contract between the parties. The objections are rather to the issue of a commission for the purpose of such evidence. The question would seem to require almost a treatise on the law of the State on the subject. It is urged that cross-examination will be necessary. It would be better that the evidence should be taken in open court. It is impracticable to frame cross-interrogatories to such general questions. To save expense and time I refer this motion to the learned judge in Chambers. See L. R. 1 P. D. 107; 20 Ch. D. 760.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

COTTON CO. V. CANADA SHIPPING CO.

Sale by agent—Undisclosed principal—Tender and plea of payment.

Action by respondents to recover the price of a cargo of 810 tons of coal sold by I. M. & Co., their agents, through W., a broker. They bought and sold notes, stated that the coal, 810 tons, was sold to arrive at \$3.75 per ton of 2240 lbs., "buyers to have privilege of taking bill of lading or re-weighing at sellers' expense." I. M. & Co. were known to be general agents of the respondents. The appellants elected to have the coal as per bill of lading without having it weighed, but three weeks later, on weighing it in their own yard, without notice to the vendors, they found the cargo to contain only 755 tons 580 lbs. The appellants pleaded that their contract was with I. M. & Co., and that the respondents had no action; and by a second plea they alleged that they had offered part of the amount claimed to I. M. & Co.

which they had tendered to the respondents without acknowledging their liability, which sum they now brought into Court.

Held, affirming the judgment of the Court of Queen's Bench, (FOURNIER and HENRY, JJ. dissenting),

1. That by their plea of tender and deposit in in Court the appellants had acknowledged their liability to the respondents on the contract.

2. That under the circumstances the appellants were prevented by their agreement from claiming a reduction in the price for the deficiency in quantity.

Beigue and *Trenholme* for the appellants.
Leflamme, Q.C., and *Davidson* for respondents.

G. T. R. CO. V. WILSON.

Verdict—Motion for judgment on verdict—Motion for new trial—34 Vict., cap. 4, sec. 10.

The respondent obtained verdict from a jury in the Superior Court District of Iberville, for injuries caused by the negligence of the appellants. The motion for judgment on the verdict was not made before the Superior Court, District of Iberville, but was drawn up and placed on the record while the case was pending before the Court of Review at Montreal. That Court, on motion, directed a new trial, but the Court of Queen's Bench, on appeal, held that the jury having found that the respondent was lawfully on the highway when the accident occurred and that the appellants could, by the exercise of ordinary care and diligence, have avoided it, rejected the motion for a new trial and directed judgment to be entered for the respondent.

Held, TASCHEREAU and GWYNNE, JJ. dissenting), that the Queen's Bench was right.

Per TASCHEREAU and GWYNNE, JJ. The Superior Court sitting in review at Montreal has no jurisdiction to determine a motion for judgment upon the verdict in a case tried in one of the rural judicial districts, and therefore the Court of Queen's Bench had no power to enter judgment for the respondent upon the verdict.

Per GWYNNE, J.—The Court of Review, on a motion for new trial in the first instance, having in its discretion granted same, judgment should not have been reversed on appeal.

S. Bethune, Q.C., and *McRae*, for appellants.
Carter, Q.C., and *Dawson* for respondent.

SHAW V. ST. LOUIS.

Appeal to Supreme Court of Canada—Final judgment as to part of demand.

The respondent claimed of the appellants \$2,125.75 balance due on building contract. The appellant denied the claim, and by incidental demand claimed \$6,368 for damages resulting from defective works. On 27th March, 1877, the Superior Court gave judgment in favour of the respondent for the whole amount of his claim, dismissing the appellants' incidental demand. This judgment was reversed on review on 29th December, 1877. On 24th November, 1880, the Court of Queen's Bench held that the respondent was entitled to the balance claimed by him from which should be deducted the cost of rebuilding part of the defectively constructed work, in order to ascertain which the case was remitted to the Superior Court, by whom experts were appointed to ascertain the damage, and on their report the Superior Court on 18th June, 1881, held that it was bound by the judgment of the Court of Queen's Bench, and deducting the amount awarded by the experts from the balance claimed by the respondent gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench on 19th January, 1882.

Held, on appeal, that the judgment of the Queen's Bench of the 24th November, 1880, was a final judgment as to the merits, referring to the Superior Court only the question of the cost of re-building, that the Superior Court, when the case was remitted to them, rightly held that it was bound by that judgment, and that the respondent was entitled to the balance thereby found due to him, and therefore this appeal should be dismissed.

Kerr, Q.C., for the appellants.

Doutre, Q.C. and *Ouimet*, Q.C., for respondents.

BAIN V. CITY OF MONTREAL.

Assessment for flagstone paving—Resolution of City Council—Validity of proceedings—Onus of proof—37 Vict., cap. 51, sec. 192 (Q.)—C. C. arts. 1047, 1048.

Under 37 Vict., cap. 51, sec. 192 (Q.), the respondents' Council, adopting the reports of the road and finance committees, ordered a flagstone paving to be laid in front of the appellant's property, amongst others, half of the cost to be

paid by means of a special assessment on the proprietors and usufructuaries in proportion to the frontage of their properties. The appellant was assessed on 27th January, 1877, and during 1877 and 1878 she paid the assessment, including interest, in three instalments, two payments being made after notice and request given and made under the above Act, and the third without notice. She made the payments without protest or reserve and without objecting to the construction of the pavement. The action was brought to recover the amount so paid.

Held, affirming the judgment of the Court below, (HENRY and GWYNNE, JJ., dissenting) that the presumption was that, when the appellant paid the amount of the assessment, she was aware of the grounds on which she now relies to recover the amount, and that the payments were not made through error nor under *contrainte*, but voluntarily.

Held, also, that the respondents in laying pavements in parts of the City, only the cost of which was to be paid by assessment according to the frontage of the respective properties and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict., cap. 51, sec. 192.

Barnard, Q. C. and *Creighton*, for the appellants.

Rae, Q. C., for the respondents.

BANK OF MONTREAL V. PERKINS.

The Banking Act—Advances on Real Estate.

B., on 29th January, 1876, transferred to the appellants by notarial deed an hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C. to set aside a prior hypothec given by C. and establish their priority over it.

Held, affirming the judgment of the Court of Queen's Bench, that the transfer by B. to the appellants was null and void as being in contravention of the Banking Act, 34 Vict., cap. 5, sec. 40.

Laflamme, Q. C., for the appellants
Benjamin, for the respondents.

REGINA V. MCLEOD.

Petition of Right—Government Railway—Negligence—Crown, not common carriers.

The suppliant purchased a first-class ticket to travel from Charlottetown to Souris, on the P. E. I. Railway, which is owned by the Dominion of Canada, and worked under the management of the Minister of Railways, and while on his journey he sustained serious injuries, the result of an accident to the train. The learned Judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of the contract entered into by Her Majesty through her authorized agent to convey the suppliant safely and securely on said journey, and he awarded \$36,000 damages.

Held, (FOURNIER and HENRY, JJ., dissenting) that the establishment of Government Railways in Canada is a branch of the public service, created by Statute for purposes of public convenience, and not entered into upon or to be treated as private mercantile ventures, and therefore, that a petition of right does not lie against the Crown for injuries resulting from the non-performance, misfeasance, wrongs, negligence, or omission of duty of the subordinate officers or agents employed in the public service.

Held, also, that the Crown not being a common carrier, is not liable for the safety and security of passengers using government railways.

Lash, Q. C., and *Hodgson*, Q. C., for the Crown.

Davis, Q. C., and *A. F. McIntyre*, for the respondent.

GIRALDI V. LA BANQUE JACQUES CARTIER.

Agency—Payment—C. C., art. 1143—Parties.

S. Giraldi acquired during the life of his first wife, M. A. Bosna, who died in 1845, certain immoveable property which formed part of the *communauté de biens* existing between them. At his death, in 1869, after his marriage with Henriette Senecal, his second wife, he was greatly involved. His widow, H. S., having accepted, *sous bénéfice d'inventaire*, the universal usufructuary legacy made in her favor, by S. G., continued in possession of his estate as well as of that of M. A. Bosna, the first wife, and administered both, employing one G., to collect,

pay debts, &c. Shortly afterwards, at a meeting of S. G.'s creditors, of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to S. G., with the advice of an advocate and the cashier of the respondents, two of the creditors, and promising to ratify anything done on their advice, and they resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned amongst S. G.'s creditors, *pro rata*. G. continued to collect the fruits and revenues and rents and acted generally for H. S. under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. Bosna, the first wife, with the respondents, under an account headed "succession, S. Giral di." The Bank subsequently paid out some of these monies on H. S.'s cheque. At her death there remained to the credit of the account "succession, S. Giral di," a sum of \$9,635.59, for which this action was brought by the heirs and representatives of Dame M. A. Bosna.

Held, (*per* STRONG, TASCHEREAU and GWYNNE, JJ. RITCHIE, C. J. and FOURNIER and HENRY, JJ., *contra*) that as between the heirs Bosna and the Bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G., belonging to the heirs Bosna, were so collected by him, as the agent of H. S., and not as that of the Bank; and, as the representatives of H. S. were not parties thereto, the appellants could not recover the moneys sued for.

Beigue and Trenholme, for the appellants.

Globensky, Q.C., for the respondents.

• HARRINGTON V. CORSE.

Will, construction of—C. C. art. 889—*Direction of testator to pay debts*—*Legatee of hypothecated property*.

On 30th April, 1869, H. S. being indebted to J. P. in \$3,000, granted an hypothec on certain real estate. On 28th June, 1870, H. S. made his will, which contained, amongst others, the following clause:—"That all my just debts, funeral and testamentary expenses, be paid by my executors, etc." By another clause he left to W. H., the appellant, in usufruct, and to his children in property, the real estate which he had hypothecated.

Held, reversing the judgment of the Court of Queen's Bench (STRONG, J., dissenting): 1. That the direction to pay debts included the debt of \$3,000 secured by the hypothec.

2. That under art. 889 of the Civil Code a particular legatee is not liable without recourse against the heir or universal legatee for a debt of the testator's secured by hypothec on the immoveable property bequeathed to him.

Doutre, Q.C., for the appellant.

Strachan Bethune, Q.C., and *Robertson*, for the respondents.

QUEEN'S BENCH DIVISION.

IN BANCO.

JACKSON V. CASSIDY.

Promissory note—*Attachment*.

A negotiable promissory note not yet due cannot be attached under Rule 270 O. J. A.

REGINA V. MALCOLM ET AL.

Trespass—*Fair and reasonable supposition*—C. S. U. C. cap. 105, 25 Vict. cap. 22, 33 Vict. ch. 27, sect. 2—*Conviction*—*Certiorari*.

The defendants were convicted of a trespass under C. S. U. C. cap. 105, as amended by 25 Vict. cap. 22. They appealed to the Sessions, which affirmed the conviction. The conviction was then brought into this Court, and a motion was made to quash it on the ground of want of jurisdiction in the convicting justice, inasmuch as it appeared by the evidence, and by affidavits filed, that the defendants acted under a fair and reasonable supposition that they had the right to do the acts complained of within the meaning of the above statutes.

Held, that that was a fact to be adjudicated upon by the convicting justice upon the evidence, and therefore that a *certiorari* would not lie for want of jurisdiction.

W. H. P. Clement, for the motion.

Aylesworth, *contra*.

TROTTER V. CHAMBERS.

Married woman—*Separate property*.

The plaintiff and her husband were married before 1859. In 1870 he, being free from debt, purchased land and had it conveyed to his wife, the plaintiff, who, with the rents and profits there-

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

of, she and her husband not living on the land, with money raised by mortgage thereof, and with money borrowed from her sons, the plaintiff purchased the chattels in question herein, which were seized under execution against the husband.

Held, that the chattels were her separate property within the meaning of R. S. O. cap. 125, sect. 1, and free from the debts of her husband.

Armour, J.]

[May 16.]

REGINA v. CLARKE.

Conviction—House of ill-fame—32-33 Vict. c. 32.

Held, that a conviction under 32-33 Vict. c. 32, sect. 2, ss. 6, for being an *unlawful* (instead of an *habitual*) frequenter of a house of ill-fame, and which adjudged the payment of costs, which is unauthorized by the statute, must be quashed.

That section makes the being such habitual frequenter a substantial offence, punishable as in sect. 17, and does not merely create a procedure for trial and punishment.

In Banco.]

[May 26.]

O'BRIEN v. CLARKSON.

Assignment in trust for creditors—Trustee's powers.

An assignment in trust for creditors contained a clause which, amongst other things, empowered the trustee to sell for cash or on credit, and *with or without security*, for the unpaid purchase money.

Held, that the introduction of the words "with or without security," was immaterial, and did not invalidate the assignment, there being no proof of any design on the part of the debtors to so enable the trustee to unfairly delay the realization of the assets.

In Banco.]

[May 26.]

CANAVAN v. MEEK.

Sale of land—Assumption of mortgage by purchaser—Liability to pay off and protect vendor.

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for \$2,000, and one to C. for \$500, which the plaintiff covenanted to pay, and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "\$1,050 and assuming the payment

of the mortgages" aforesaid, the defendant gave back a mortgage for the balance of purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made and the defendant's mortgage was discharged, and a mortgage for \$1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for \$350 and other items besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of \$500.

Held, that the defendant was bound to pay off the T. & L. Co. mortgage, and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon.

CHANCERY DIVISION.

Boyd, C.]

[June 6.]

MAGURN v. MAGURN.

Alimony—Foreign divorce—Marriage—Domicil.

Action for alimony. The defendant was born at Kingston, in 1845. He went to the States in 1862, and travelled about there from place to place till 1868, when he took up his residence in St. Louis till April, 1870. He then began going round the country on the business of his firm, returning to St. Louis at intervals, but not residing there till 1875. In October, 1870, he married the plaintiff at Detroit. He and his wife travelled together for the most part of the interval between that and the close of 1873, when they rented a house at Kingston, and lived there till May, 1875. In 1875 the husband returned to St. Louis, and lived there till April 10, 1876. Then he took his wife to St. Joseph, in Missouri, returning himself to St. Louis. He filed a petition for divorce in the Circuit Court of Missouri, on April 26, 1877, on the ground that his wife had for a year deserted him; the decree for divorce was obtained by default, after personal service on the wife on June 19, 1877. In September, 1877, the defendant married again and went to England, where he lived till September, 1881, when he returned to Toronto. The evidence showed that the plaintiff's residence at St. Louis was in order to comply with the law of Missouri, by which it is necessary that the plain-

tiff should reside in the State at least one year before bringing a suit for divorce.

Held, the divorce did not operate in this Province so as to bar the plaintiff's claim for alimony. The domicile of the husband, both at the time of the marriage and at the time of the divorce, was Canadian. His domicile of origin was Canadian, and it was never changed during his wandering and unsettled life in the States, the original domicile of the defendant continued unless he proved that he settled in that foreign country with the intention of abandoning that domicile, which he had not proved. A *de facto* removal to a home in the new country with an *animus non revertendi* and an *animus remanendi* was necessary to change the domicile. No such settled and fixed intention on the plaintiff's part of adopting the States as his home was shown here. And though his residence in the States might have been sufficient to justify the annulment of the marriage as regards the particular State or the United States, this had no such effect as regards the rights of the wife in Ontario, for with regard to the rights, duties, and obligations arising from marriage, the law of the domicile must be looked to.

J. MacLennan, Q.C., for the plaintiff.

S. H. Blake, Q.C., for the defendant.

Boyd, C.]

[June 6.

BANK OF OTTAWA V. MCMORROW.

Evidence—Onus—Promissory note not duly stamped till after repeal of Stamp Act—31 Vict., c. 1, ss. 3, 7—42 Vict. c. 17, s. 13—45 Vict., c. 1.

Where the defendant, being sued on a promissory note, did not dispute the signing thereof, nor the consideration, but swore that the said note was not duly stamped before the repeal of the Stamp Act, nor until after action brought, although he had communicated the fact of that omission to the plaintiffs before he was sued; and the plaintiffs denied that the defendant had so notified them; and the evidence showed that when the note came to the plaintiffs' hands it appeared to be properly stamped.

Held, the defendant could not be allowed, upon his own unsupported testimony, in such a case, to escape liability. The *onus* was on him to establish that the stamp was not duly affixed, and that the omission to duly stamp was *so intelligibly* communicated to the plaintiffs that it

could be said they acquired the knowledge of the defect at the time alleged by the defendant before action.

To cure defect in stamping by double stamping forthwith was, under the Stamp Act, 42 Vict., c. 17, sec. 13, an inherent right, existing during the currency of the instrument, and accompanying its possession; and, since under the Interpretation Act, 31 Vict., c. 1, ss. 3, 7, vol. 36, the repeal of an act shall not affect any right existing or accruing before the time of the repeal, therefore the said right still exists notwithstanding the repeal of the Stamp Act.

Christie, for the plaintiff.

Mahon, for the defendants.

Boyd, C.]

[June 6.

CLOW V. CLOW.

Will—Construction—Tenant for life—Waste.

A testator devised certain land as follows:—"I will devise and bequeath unto my wife for and during her natural life all that parcel of land (describing it). . . . I also will and bequeath unto her, my beloved wife, everything real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs."

The testator had no other real estate than the said land, and there was nothing to which his language, importing that his wife was to have control of everything real, as well as personal, could be referable, unless it affected the said land.

Held, the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such a life estate, so as to render the tenant for life dispunishable for waste.

White v. Briggs, 15 Sim., 17; S. C. in app. 2 Phil., distinguished.

Deacon, for plaintiff.

Webster, for defendant.

Wilson, C. J. C. P.]

[June 6.

MARTIN V. MILLS.

Right of tenant to redeem—Waiver—Confirmation of lease by mortgagee.

A tenant for years may redeem a mortgage. There is, however, no absolute right of redemp-

tion. It rests in the discretion of the Court to grant it or refuse it, according to circumstances. The lease must be a beneficial one to the tenant.

Held, in this case, where a tenant for years under a demise made subsequent to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party, the lease being a beneficial one, the plaintiff had a right to redeem, in the event of the mortgagee refusing to accept him as a tenant.

Held also, although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of \$40, yet inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his rights of redemption as such lessee by such offer.

After action brought for redemption, however, the defendant (the mortgagee who had foreclosed) offered to confirm and adopt the lease held by the plaintiff. Before action brought the defendant had refused so to do, and had, indeed, sold the property to a purchaser, said sale being not made subject to the lease. The purchaser had full notice of the lease :

Held, the tardiness of the defendant in consenting to affirm the lease, only affected the costs ; the defendant had done nothing that debarred her from confirming the lease and accepting the plaintiff as tenant, and as she was willing now to confirm the lease, the plaintiff could not redeem.

It may be said, as a rule, that every one having an interest from the mortgagor in the land, can redeem the mortgagee.

Arnoldi, for the plaintiff.

Beck, for the defendant.

Wilson, C. J. C. P.]

[June 6.

VARDON v. VARDON.

Action for alimony—Right of plaintiff to compromise—Rule 97—Enforcement of compromise—Separate negotiations for settlement carried on simultaneously between clients and their solicitors respectively—"Without prejudice."

A married woman can not only bring an action for alimony against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor

can : *Reasant v. Wood*, L. R. 12 Ch. D.; *Hart v. Hart*, L. R. 18 Ch. D. 670.

If the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant : *Wilson v. Wilson*, 1 H. L. Cas. 538.

If, in such a case, negotiation with a view to a settlement are carried on between the parties by means of letters marked "without prejudice," and if, by means of such letters, a perfect contract has been come to between the parties, the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words.

If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party, unknown to his solicitors or to the solicitors of the other party, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal. In such a case the one principal has direct notice from the other principal that the negotiations have been put an end to.

Semble, if in such a case the principals had, between themselves, entered into an agreement, and the solicitors, in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind, because prior in time, and made by and under the full authority of the principals.

On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agent are of no avail as against their principals.

Blackstock, for the plaintiff.

Bain and Gordon, for the defendant.

Wilson, C. J. C. P.]

[June 6.

EDWARDS v. MORRISON.

Mortgage—Priority—Notice.

On April 4, 1863, M. the owner of land, mortgaged in fee to the Canada Permanent L. & S. Com-

pany, his wife barring dower. On May 21, 1867, M. conveyed to a trustee to the use of his wife in fee. This deed was void as against creditors. On March 14, 1868, M. mortgaged the same land to the company in fee, his wife barring dower. On Dec. 17, 1872, M. again mortgaged the same land to the company in fee, his wife barring dower. These three mortgages to the company represented the same debt. No further advance was made on the second or third mortgage, but they were taken merely in extension of time of payment. On Dec. 21, 1874, M. mortgaged the land in fee to one G., his wife barring dower. On March 6, 1876, G. assigned to the plaintiff. On June 7, 1876, M. and his wife jointly mortgaged in fee to the plaintiff.

At the time the plaintiff took the assignment of the G. mortgage, on March 6, 1876, he had express notice and knowledge of the three mortgages to the company. He knew the company claimed their whole debt against the land, because they had the legal estate by their first mortgage, and he knew also of there being a defect in the title of the company by their second and third mortgages, by reason of M. being the grantor, and not his wife; but he did not know of the circumstances making the deed to the trustee of May 21, 1867, void as against creditors:

Held, the plaintiff was, under the above circumstances, bound, as a subsequent mortgagee, in respect of title, but more especially in respect of the state of accounts between the company and M. and his wife; and the company could maintain their priority in respect of their second and third mortgages as against the plaintiff. The knowledge which the plaintiff had before and at the time of the purchase of the mortgage from G. of the defect of title of the company under their second and third mortgages, by reason of the husband being the mortgagor instead of his wife, did, as a matter of title, while the legal estate was vested in the company, enable the company to maintain their priority in respect of the two mortgages as against the plaintiff. Moreover, the plaintiff acquired his title with a knowledge that the company claimed a debt represented by the three mortgages, and took it, subject to such claim of the company. The three mortgages represented the same debt, and the last mortgage might be taken as a statement of accounts, at the time the last mortgage was taken, between the company and M. The

plaintiff, therefore, could not claim priority as against the second and third mortgages of the company.

McMichael, Q. C., and *Hoskin*, Q. C., for the plaintiff.

Lash, Q. C., for the defendant.

Boyd, C.]

[June 6.]

FALKINER V. GRAND JUNCTION RY.

Company — Directors — Solicitor and client — Payment of Solicitors by salary.

Where the directors of a railway company passed a by-law enacting that the salary of the plaintiff, as solicitor of the company, should be fixed at \$1,000 per annum:

Held, the by-law was within the competence of the directors: R. S. O. c. 66, sec. 47. Without express power it is the right of the directors of a railway company to appoint necessary officers and agents of the company, and to provide for their manner of payment. The agreement to pay the solicitor a fixed sum as a yearly salary in lieu of paying items in detail, is neither illegal nor unusual, whether it provides for the past or the future.

Dougall Q. C., and *Cassels*, for the plaintiff.

Cameron, Q. C., for the defendants.

Proudfoot, J.]

[June 7.]

COWAN V. PESSERER.

Will — Powers of appointment — Election of Widow — Separate Devises — Construction.

A testator devised certain lands to his wife "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed, under her hand and seal, and to his heirs and assigns, forever."

The widow married again, without having executed the power.

Held, the whole period of the life of the donee was allowed for the execution of the power, for though the power of appointing in respect to her decease must of necessity have been exercised before the event, that could not affect the construction of the second power of appointing in the event of her marrying again. The language would rather seem to indicate that in the latter case the power might be exercised after the

event, and, there being no specific limitation as to time, she might execute it any time during her life. Indeed the doubt would rather appear to be whether she could exercise it till after her marriage.

The testator also devised certain lands to his wife, to have and to hold the same unto his said wife, her executors, administrators, and assigns for the following uses :—To sell and dispose of the same as she should think proper and right, and the monies thereupon coming and arising to use and apply for the payment of his just debts, and for the maintenance of herself and her minor children and the education of such children as his said wife should see to be fit and necessary ; and he authorized his wife to convey to purchasers in fee, and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain 21, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children.

The testator was twice married.

Held, the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or to investigate the amount required for maintenance, though the minor children might have had a right to claim a maintenance had it been refused.

Quære.—Whether wife did not take absolutely the balance of proceeds of sale not required for debts or maintenance.

In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others.

J. H. Macdonald, for the plaintiff.

Lash, Q.C., for adult children of 1st marriage.

T. S. Plumb, for infants of 1st marriage.

McTavish, for children of 2nd marriage.

Proudfoot, J.]

[June 7.

EDWARDS V. PEARSON.

Will—Construction—Cumulative legacies.

A testator, by his will, directed his debts and funeral expenses to be paid by his executors, the residue he gave as follows :—"Secondly, I give, devise and bequeath to my beloved wife the sum of \$150 annually, during the remainder of her natural life, or so long as she may remain

my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate and to be paid my said wife as she may need it, either quarterly or half-yearly." He also gave his wife his household furniture to dispose of as she might think proper. He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds, first, to pay all his debts and funeral charges, etc., as aforesaid ; and then to each of his daughters \$312 ; the balance then remaining was to be divided between his sons, subject to each of them securing to their mother an annual payment of \$50 during the remainder of her natural life, the security to be satisfactory to her and his executors.]

Held, there was an intention apparent on the face of the will that the annuities in favour of the wife were to be cumulative ; this appeared from the points of difference between the first annuity and the others, and the insufficiency of the estate to answer all the legacies was not a sufficient circumstance to vary this construction of the will. In the absence of any intention apparent on the face of the will, the rule is that where two legacies of quantity of equal amount are bequeathed to the same legatee in one instrument, there the second bequest is considered a repetition, and the legatee shall be entitled to only one legacy : *Williams on Exec. Vol. 2, p. 1295.*

Black, for the plaintiff.

C. Moss, Q.C., for the defendant Edwards.

Robinson, for the executors.

Proudfoot, J.]

[June 7.

TOOMEY V. TRACY.

Will—Construction—Mixed fund—Interest on legacies.

Special case. A testator directed his executors to pay all his just debts and general expenses out of his personal property, and if that proved insufficient then he authorized them to sell so much of his real estate as would be sufficient to make up the deficiency. He then directed his land to be sold. Then he ordered the interest of all capital arising from the sale of the land to be paid yearly to his wife for her maintenance during her natural life. He then gave a number of charitable bequests and pecuniary legacies. There was no residuary gift.

Held, the testator had created a mixed fund to answer the purposes of his will. If the personality was not sufficient for the payment of the debts, then the legacies were payable out of the proceeds of the land, if it was sufficient they were payable out of the mixed fund. So far as the charitable legacies were payable out of the proceeds of the land they were void. Test proposed by Sir S. Turner in *Tench v. Cheese*, 6 D. M. G. cited as sufficient for the disposal of this question.

Held also, interest was payable on the legacies which were payable out of the land from a year after the testator's death; and that, although, as the whole interest of the proceeds of the land was given to the wife for life, the capital had to be kept invested by the executors, and there was therefore no fund for the payment of legacies till her death.

The general rule is that legacies carry interest after the expiration of a year from the death, though payment be from the condition of the estate impracticable, and though the assets have been unproductive; and this rule applied here, for the words of the will imported a present gift, and the legacies did not form part of a trust to be executed in future, in which case a different rule applies: *Wood v. Penryre*, 13 Ves. 325; *Lord v. Lord*, L. R. 2 Ch. 784.

J. J. Foy, for the plaintiffs.

C. C. McCaul, for the defendants, Thomas Tracy and Stephen Rogers.

Fitzgerald, for the heirs-at-law.

Divisional Court.]

[June 11.]

FOLEY V. CANADA PERMANENT L. & S. CO.

Deed of infant--Affirmation--Acquiescence.

Judgment of the Chancellor, noted *supra*, vol. 18, p. 423, (where, however, it is erroneously stated that no steps were taken to disaffirm the mortgage till Dec. 7, 1881; this should be "Sept. 7, 1882," affirmed.

The rule may now be considered as well established that the deed of an infant is not void, but voidable, on his attaining his majority, if it prove to be injurious to his interest. Being voidable, he may disaffirm or affirm it on attaining majority. How this is to be proved, and within what time the option may be received, have long been subjects of controversy, but our own and the English cases establish that an infant is bound expressly to repudiate his contract

within a reasonable time after arriving at majority, and that if he neglect so to do his silence will amount to an affirmation.

C. Moss, Q.C., for the plaintiff, (appellant.)

W. Cassels and Leonard, *contra*.

Divisional Court.]

[June 11.]

HOPKINS V. HOPKINS.

Devise of rent to attesting witness--25 Geo. II., c. 6, s. 1--R. S. O. c. 108.

Judgment of PROUDFOOT, J., noted *supra* vol. 18, p. 401, affirmed.

Although it is now settled that the provisions of 25 Geo. II., c. 6, s. 1, as to beneficial gifts to attesting witnesses of wills, do not apply to wills of mere personal estate, but only to such wills and codicils as were by the Statute of frauds required to be attested,—yet the testamentary disposition of the rents pending the lease could not be considered as only tantamount to a will of personal estate *quoad* the rents,—for rent issuing out of land is a tenement; it partakes of the nature of land and is within the Statute of Frauds, which relates to lands and tenements. Consequently the case had to be dealt with as if there had been a complete intestacy as to the land in question: and the collection of the rents by the executor, instead of by the heirs-at-law, the persons rightfully entitled, and the payment of them to J. H. was, in effect, a possession of the land by J. H., in favour of whom the Statute of Limitations ran.

Moss, Q.C. and *Nesbitt*, for plaintiffs.

Blake, Q.C. and *Lazier*, for defendant, Columbus Hopkins.

Boyd, C.]

[June 20.]

RE J. T. SMITH'S TRUSTS.

Repairs by tenant for life--Settled estates--Sale by court--R. S. O. c. 60, s. 85.

Petition under Settled Estates Acts. A testator devised certain property to M. H. for life, and afterwards to any child of M. H. who might survive her in fee. She had one child aged ten, when she presented this petition claiming to be allowed for expenditure made by her upon two houses on the land for much needed repairs, and lasting improvements about \$500, and for \$100 paid to a tenant for improvements made by him under a promise from the testator that the tenant should be paid for them, and for a sale by the Court.

Held, the petitioner might be reimbursed the \$100 from the testator's general estate, as the claim she paid appeared to be a debt due by the testator; but neither this nor the other expenditure could be charged on the land. It is against all the authorities to burden the estate with such charges. The petitioner could not be reimbursed the repairs, for the repairs of a tenant for life, however substantial and lasting are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance.

Held, however, it was a proper case for the sale or leasing, with a right to build, of the settled estate, for there was no means from the income of the property of putting it into a sufficiently remunerative condition to support M. H. and her child. M. H. was not obliged to support the infant, and it was imperative to deal with the property in such a way as to supply proper maintenance for the boy.

Arnoldi, for the petitioner.

PRACTICE CASES.

Osler, J.] [Nov. 10, 1882.

BOTHWELL ELECTION PETITION.

Election—Issue—Preliminary objections—Examination—37 Vict. (Can.) ch. 10.

Preliminary objections (sect. 10) presented after the expiration of five days from the service of the petition, are not void, as the time for their presentation may be extended (sect. 43), and by analogy to ordinary practice such extension may be obtained even after the expiration of the time originally fixed by statute, (*Wheeler v. Gibbs*, 3 S. C. R. 347), they are at most irregular, and therefore the petition is not at issue under sect. 11, and an examination of the parties under sect. 14 cannot be had while they remain undisposed of.

Holman, for the petitioner.

Beck, contra.

Osler, J.] [May 29, 1883

COULSON V. SPIERS.

Interpleader—Jurisdiction.

Upon the return of an interpleader summons taken out by a sheriff, the judge of the County

Court of the County of Grey made an order protecting the sheriff, barring the claimant, and containing other provisions.

Held, on appeal, that an interpleader not being an action under sect. 91, O. J. A., but a proceeding in an action (*Hamelyn v. Bettley*, L. R. 6 Q. B. D. 63), the Master in Chambers had jurisdiction to make such an order, (Rules 2 and 422, O. J. A.) and so had the County judge.

Marsh and Aylesworth, for execution creditors.
Holman, for sheriff.

Proudfoot, J.] [June 2.

BUCKE V. MURRAY.

Dismissal for want of prosecution—Sects. 12 and 52, and Rule 255 O. J. A. and Chy. G. O. 276.

An appeal from the order of the Local Master in Hamilton dismissing the bill for want of prosecution.

Held, that there is no inconsistency between Chy. G. O. 276, and the O. J. A. sects. 12 and 52 and Rule 255.

The general rule still remains that an undertaking to speed the cause is not a sufficient answer to a motion to dismiss for want of prosecution, but it is still discretionary with the judge to say whether, under all the circumstances, the bill should be dismissed.

The Court, in the exercise of its discretion, allowed the plaintiff to go down to immediate trial, where a delay of a year and a half appeared to have arisen from the residence out of the jurisdiction of the defendant, and some hesitation as to proceeding with the case from the negligent manner in which the defendant was cross-examined under a commission executed out of the jurisdiction.

Muir, for the plaintiff.

Lash, Q.C., for the defendant.

Proudfoot, J.] [June 2.

MILLER V. BROWN.

Mortgagee in possession.

An application by the defendant O'Brien for leave to appeal from a judgment given on the 16th December, 1882, notwithstanding that the time for giving notice of appeal has elapsed.

Held, that the fact of the defendant being resident in England, and that by the judgment in question further directions are reserved, and

that in making up an account by a mortgagee in possession unexpected difficulties present themselves, owing to delays by the plaintiff and the death of parties who could give information as to changes, which would probably swell the account of the mortgagee, are not such special circumstances as will induce a judge to grant leave to appeal.

The distinction between applications for indulgence prior to decree and subsequent to decree, commented on.

S. H. Blake, Q.C., for the defendant Brown.
Hoyles, for the plaintiff.

Cameron, J.] [June 6.

ARKELL V. GEIGER.

Interpleader—Sheriff's costs—Scale.

Where execution issued out of the High Court of Justice, and the sheriff obtained an interpleader order under which an issue between the parties was directed to be tried in the County Court under 44 Vict. c. 70.

Held, that the sheriff was entitled to his costs under the interpleader order, to be taxed on the scale of the Court out of which the process on which he seized the goods issued.

Semble, that the parties to the issue should also have their costs prior to the order directing the issue on the Superior Court scale. *Beatty v. Bryce*, 90 P. R. 320, explained.

Clement, for the sheriff.

J. B. Clarke, for the execution creditors.

Aylesworth, for the claimant.

Proudfoot, J.] [June 6.

RE SOLICITOR.

Solicitor—Restoration to roll—Evidence.

Upon a petition by a solicitor who was struck off the roll on the 1st September, 1874, for not having paid over money collected by him for a client, to be restored to the roll, and to have the order striking him off rescinded, it was shown that the solicitor had now paid the money, and the consent of the creditor to the prayer of the petition was also produced.

Held, that corroborative evidence of the conduct of the solicitor during the period that his name was removed from the roll, should be furnished, and that notice of the application should be given to the Law Society.

An affidavit testifying to the propriety of the solicitor's conduct having been subsequently furnished, it was ordered that the solicitor be restored to the roll if the Law Society offer no opposition.

An order to rescind the order striking the petitioner off the roll, was refused.

Aylesworth, for the solicitor.

Boyd, C.] [June 6.

SULLIVAN V. HARTY.

Administration order—What matters may be investigated in taking the accounts under.

It is not necessary to file a bill or bring an action for administration except in cases where matters of misconduct are charged which would entitle a plaintiff to apply, at the outset of the case, for an injunction or a receiver; in all other cases in which this course has been taken, the extra costs occasioned thereby must be borne by the plaintiff.

Britton, Q.C., for the plaintiff.

Burton, J.A.] [June 6

LUMSDEN V. DAVIS.

Practice—Security on appeal—Insolvency of surety.

Where, in consequence of the insolvency of one of the sureties in a bond given by the appellant, on appealing to the Court of Appeal, it is considered advisable to obtain further or better security, the application for that purpose should be to the Court appealed from.

Boyd, C.] [June 6.

REN V. ANTHONY.

Infant defendants out of the jurisdiction—Practice in serving process.

An application for a direction to one of the taxing officers to tax plaintiff's costs of effecting service of process upon the infant defendants resident out of the jurisdiction.

BOYD, C. — The O. J. Act and rules do not in terms provide for the practice of serving of process upon an infant resident out of the jurisdiction. Rules 36 and 37 and 70 all apply to service within the jurisdiction. This appears, therefore, to be a case in which, under sect. 12 of the Judicature Act and the head note

of the rules of Court, the former practice remains in force. That practice is defined by G. O. 610 by which an order may be obtained upon *præcipe*, appointing a guardian *ad litem* on whom service is to be made. The official guardian is to be such guardian under sect. 75 of the Judicature Act. In *Weatherhead v. Weatherhead*, 9 P. R. 96, an application was made in Chambers for such an order, but that is not necessary under G. O. 610. I cannot give effect to the objection made against the taxing officer's ruling. Something may be allowed on the taxation if the personal service on the infants has facilitated the official guardian in communicating with them as their relatives, but beyond this I do not think I can interfere. I have conferred with PROUDFOOT, J., in arriving at this conclusion.

J. H. Macdonald, for the plaintiff.

Harcourt, for the official guardian representing the infant defendants.

Boyd, C.]

[June 9.

MCLEAN v. THOMPSON.

Notice of trial, regularity of.

An action to set aside a fraudulent conveyance, brought in the Chancery Division of the H. C. J. The defendant, Garland, gave notice of trial at the Toronto June Assizes to the plaintiff and his co-defendant Thompson. The plaintiff applied to the Master in Chambers to set aside the notice, but his application was dismissed.

18th June—*A. C. Galt*, for the plaintiff, appealed from the Master's order, contending that the notice was irregular even if *Rymal v. McEachren*, (decided by the Master) 3 C. L. J. 106, should be approved. He argued that under the wording of Rule 255 O. J. A. one of two defendants cannot give notice of trial. The rule says, "either party may give notice of trial," "either party" must mean "the plaintiffs" or "the defendants," not "one of the plaintiffs" or "one of the defendants."

T. S. Plumb, for the defendant Garland, *contra*, cited *Rymal v. McEachren*, (*supra*); Rules 255, 264, 266 O. J. A.; Chy. G. O. 161; *Ambrose v. Evelyn*, 11 Chy. D. 759; *Crowther v. Duke*, 6 Dowl. P. R. 409; Griffith and Loveland's Judicature Acts, O. 35, rr. 4 and 4 a.

BOYD, C.—*Rymal v. McEachren*, (*supra*) of which I approve, decides that this action may be

properly set down and tried at the current Toronto assizes. The only new question is whether it is open for one of two defendants, under Rule 255, to give notice of trial. Having regard to the former practice, I think that it is competent for one of several defendants, where the action is as to all ripe for trial, to bring the case on under Rule 255. "Either party" is to be read *any* party. That is the word used in the original of this part of the rule, namely, Chy. G. O. 161, and the late order repeating it No. 605. That order passed on 12th February, 1872, provides that in cases where issue is joined three weeks before the day appointed for the commencement of the sittings, and the plaintiff neglects to set down the cause for hearing at the sittings next after the cause being so at issue, any defendant may set the cause down for hearing . . . and may serve notice of hearing on the other parties to the cause. G. O. 163 provides that notice of setting down is to be served by the party setting down. These orders were to remedy the former practice which prevailed in England, which permitted one defendant to set down a cause and serve the plaintiff with *sub-pœna* to hear judgment, and then it devolved on the plaintiff to serve the other defendants: *Clarke v. Dunn*, 5 Mad. 474; *Smith v. Wells*, 6 Mad. 193. I regard this notice of trial as regularly given, and dismiss the appeal with costs in the cause to the respondent.

Mr. Dalton, Q.C.]

[June 11.

MILES v. CAMERON.

Foreclosure—Motion to open.

A motion to open up a judgment of foreclosure.

It was sworn by the applicant that the mortgage debt and costs for which foreclosure was ordered, amounted to about \$3,000, and that the value of the property was \$7,000, and he clearly showed that his delay in paying the debt arose because he thought the effect of the judgment would be a sale of the property.

The Master found upon the affidavit filed that \$7,000 was an over estimate, but that the claim was a good deal less than the value of the property, but did not feel justified in opening the foreclosure.

Motion dismissed with costs.

F. Arnoldi, for the application.

W. Fitzgerald, *contra*.

Boyd, C.]

[June 18.

MCGANNON V. CLARKE.

Taxation—Costs of survey and plans—Master's fees.

An action to restrain waste and for ejectment. The plaintiff and defendant were the owners of adjoining lots, and the defendant claimed title to, and cut timber upon land enclosed by the plaintiff, the defendant claiming by possession, and also asserting that the line between the lots was not properly drawn. Judgment was given for the plaintiff with costs of the action. The costs were taxed by the Local Master at Ottawa, and were subsequently revised by one of the taxing officers at Toronto. Upon appeal by the plaintiff, desiring to have allowed certain items, which were disallowed upon revision :

Held, that the English Chancery Order 120 (1845) providing that the Master might allow such just and reasonable charges as appear to have been properly incurred in procuring evidence and the attendance of witnesses, has not been incorporated into our practice. Outlay for surveys and other special work of that nature made and undertaken in order to qualify the surveyors to give evidence, are not taxable as between party and party.

The taxing officer refused to allow charges for maps prepared to identify the details of the line mentioned in the judgment as that which the judge considered the true line, considering that although they were useful and convenient it was not proper, in the circumstances, to allow them. He also refused to allow charges for procuring a certificate of the state of the cause, for a letter advising of judgment, and for instructions on motion for judgment.

Held, that these were all within the discretion of the officer, and that his ruling should not be disturbed.

Held, that the Master at Ottawa, who is paid by means of fees and not by salary, acted properly under the Chancery Tariff of 23rd March, 1875, which allows him at the rate of \$1 for each hour engaged in taxing costs.

F. Arnoldi, for the plaintiff.

T. Langton, for the defendant.

Mr. Dalton, Q. C.]

[June 19.

ABELL V. PARR.

Foreclosure—Adding parties after judgment.

An action upon a mortgage for foreclosure. The original defendants, Henry and Joseph

Parr, did not appear, and judgment of foreclosure was given against them.

Pendente lite, and before judgment, Hannah and Samuel Parr became interested in the equity of redemption, having been before the action, and still continuing to be, in possession of the mortgaged premises.

On the 1st of May, 1883, upon the application of the plaintiff, an order was made *ex parte* adding Hannah and Samuel Parr as parties defendant, and directing that they be bound by the judgment of foreclosure. Upon motion (11th June, 1883,) to rescind this order,

Held, that Hannah and Samuel Parr should have been added before decree, and should not have been made parties to a foregone judgment by which their rights were concluded. These persons, being in possession, must be heard in their defence by the proper tribunal before they can be turned out.

C. J. Leonard, for the added defendants.

T. Langton, for the plaintiff

COLE V. CAMPBELL.

Interpleader issue—New trial, when tried by jury—Application to the Divisional Court.

Upon the 5th June, 1883, the defendant in an interpleader issue applied to a single judge in court for a new trial of the issue, which was sent from the Chancery Division to be tried at the London assizes, and was there tried by a judge with a jury.

Held, that Rule 307, O. J. A. which provides that when there has been a trial by jury any application for a new trial shall be to the Divisional Court, embraces every application of this kind, not excluding interpleader proceedings.

Application enlarged before the Chancery Divisional Court.

No costs were given against the defendant in the first instance as the former Chancery practice authorized the application, and the plaintiff may have been misled by *Barker v. Leeson*, 9 P. R. 107, which was decided since the O. J. A. but in which the interpleader order was made before the Act, and no objection was taken to jurisdiction.

E. Stonehouse, for the defendant.

Colin Macdougall, for the plaintiff.

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No. 13.

DIARY FOR AUGUST.

1. Thurs.. Battle of the Nile, 1798.
5. Sun.... *Eleventh Sunday after Trinity.*
6. Mon.... Prince Alfred born, 1844.
7. Tue.... Primary Examination.
9. Wed.... Primary Examination.
12. Sun.... *Twelfth Sunday after Trinity.*
13. Mon.... Sir Peregrine Maitland, Lieut.-Gov. U. C. 1818.
14. Tue.... First Intermediate Examination.
15. Wed.... First Intermediate Examination.
16. Thurs.. Second Intermediate Examination.
17. Fri.... Second Intermediate Examination.
18. Sat.... Gen. Hunter, Lieut.-Gov. U. C., 1799.
19. Sun.... *Thirteenth Sunday after Trinity.*
21. Tue.... Long vacation ends. Exam. for Certificates of Fitness.
22. Wed.... Judicature Act came into operation, 1881. Exam. for Call.
25. Sat.... Francis Gore, Lieut.-Gov. U. C., 1806.
26. Sun.... *Fourteenth Sunday after Trinity.*
27. Mon.... Trinity Term (Law Society) begins.
30. Thurs.. Rehearing in Chy. begins.
31. Fri.... Long vacation in Ct. of Appeal and Sup. Ct. ends

TORONTO, AUGUST 1, 1883.

FEELING strongly that our readers will be happier for a respite from rich food during the "dog days," we omit, according to custom, a second number this month. As there may, however, unhappily be one voracious subscriber who would feel aggrieved, we give some extra pages in this issue. All the same, we counsel that vacation be kept as sacred and as free from law (even from our enticing pages) as possible.

WE have been asked to state that the General Committee, appointed at a meeting of the Bar held on the 7th July, to make arrangements for the dinner to the Lord Chief Justice of England, have directed the secretaries to send to each County town a form of guarantee similar to that which has been extensively signed in Toronto and Hamilton. The object of this is to ascertain as nearly as possible what number of tickets will be applied for. The secretaries have sent these guarantees as directed to some member of the Bar in each County, and they

are anxious that any who have not had, by this means, an opportunity of putting down their names, will write direct to them. As there are nearly 150 subscribers at present and the hall will only seat some 240, the General Committee have decided to give a preference to those signing the guarantee over those desiring to come in later on. At the first meeting of the Committee on 28th July, it was decided that the County Judges should be placed on the same footing as the Bar as regards tickets. Lord Coleridge has communicated his acceptance of the invitation extended to him, and has fixed the date of the dinner on the 12th September next. The secretaries are W. T. Boyd, Esq., and Frank E. Hodgins, Esq., Toronto.

A subscriber sends us a letter handed to him by a client, received by the latter from a person whose name, we believe, appears on the roll of solicitors. It is addressed to a lady in reference to some legal proceedings which he understood were being taken against her. Being possibly desirous that she should be supplied with the best legal advice, or more probably being in want of a client to vary the monotony of his office life he thus writes:—"I have taken the liberty to ask that in case you wish to contest the case, to undertake your defence. In case you think of employing me I will do the best for your cause." The English is so shaky, and the whole production so feeble, as to suggest the thought that perhaps after all the mind of the writer may not have been able to grasp the idea that he was troubling either the ghost of Lindley Murray or the Discipline Committee of the Benchers—possibly he never heard of either. We have not the heart to be severe with him;

COUNTY JUDGES' ANNUAL MEETING—THE JUDICATURE ACT AND THE DIVISION COURTS.

like many others in the profession he has simply mistaken his vocation. Perhaps he thought he was preparing himself for the office of Solicitor-General, not knowing that it was abolished years ago. But let him not despair, industrious peddlers of small wares gain a living in various lines of business.

COUNTY JUDGES ANNUAL MEETING.

The Tenth Annual Meeting of the County Court Judges was held in the Benchers' Convocation Room at Osgoode Hall, Toronto, on Wednesday and Thursday, the 27th and 28th days of June, 1883, pursuant to the usual notice convening the same, issued by the Secretary, His Honor Judge Boyd.

The attendance was fairly large. The following Judges were present:—His Honor Judge Gowan, *Chairman*, and Messrs. Burnham, McQueen, Jones, Kingsmill, Toms, Senkler, Macpherson, Price, Wilkinson, McMahon, Bell, Boyd, Benson, Dartnell, McDougall, and Sinclair, JJ.

Judge Boyd resigned his position as Secretary to the meeting, and Judge McDougall was elected Secretary.

A number of questions affecting practice were discussed at considerable length by the Judges present during their two days session—more particularly questions arising in consequence of the changes effected by the Judicature Act. The extent to which the Rules of Practice under that Act affect Division Court practice was also considered, and the opinion of a majority present seemed to be in accord with a recent decision of Judge McDougall on the subject, in a case reported in another place in this number. Upon the question of introducing some of the rules of the Judicature Act by exercising the discretion conferred by section 244 of the D. C. Act, for cases unprovided for by the D. C. Act, there was not the same unanimity of opinion.

Some questions of practice and procedure under various criminal Acts, and under the School Acts, were discussed and opinions assimilated.

It is understood also that the Judges authorized their Chairman to confer with the Attorney-General upon the advisability of power being granted to the Board of County Judges to frame a tariff of costs for the County Court, and a tariff for costs of proceedings under various statutes, any such tariff to be approved of by the Superior Court Judges.

The meeting separated on Thursday the 28th June, to meet again on the 28th June, 1884.

THE JUDICATURE ACT AND DIVISION COURTS.

WE publish two judgments in this number delivered by County Court Judges, dealing with the question of the applicability of the Rules in the Schedule to the Judicature Act to Division Court practice—*Building and Loan Association v. Heimrod*, a decision by Judge McDougall; and *Smith v. Lawler*, a decision by Judge Dartnell.

We believe both of these judgments, as well as the judgments of Judge Clark in *Burk v. Britain*, 19 C. L. J. 72, and of Judge Dean in *Cowan v. McQuade*, 19 C. L. J. 108, were discussed by the County Judges at their late conference at Osgoode Hall.

It is said a majority of the Judges approved of the views expressed in *Building and Loan Association v. Heimrod* and in *Cowan v. McQuade*. A few, however, were of the opinion that the practice under Rule 80 of the Judicature Act might be introduced into the Division Court by the exercise of the discretion conferred by section 244 of the D. C. Act. Judge Dartnell goes further in *Smith v. Lawler*, and relies upon the general language of sects. 77 and 80 of the Judicature Act, as expressly conferring the power to introduce a practice similar to the practice under Rule

THE NEW SILKS.

80. We would incline rather to adopt the view of Judge McDougall as to the force and meaning of these sections of the Act, as expressed by him in his judgment in *Building and Loan Association v. Heimrod*, published in this number; the more so as his opinion seems to be supported by the latest English decision: *Pryor v. City Offices*, L. R. 10 Q. B. D. 504. This judgment of the Queen's Bench Division is upon the corresponding sections of the English Act, which are identical in language with sections 77 and 80 of our Act, and the full Court decides that these sections do not introduce the practice under the rules to the English Act into the inferior Courts, but that such Courts must afford "relief, redress, or remedy" by their own procedure and machinery.

It is to be hoped that the consideration which all of these decisions will unquestionably receive from the County Judges, will lead to their adopting a uniform practice upon these points, or, should there still be divergent opinions, that a decision will speedily be obtained from some one of the Superior Courts which will remove all doubts.

THE NEW SILKS.

The *Canada Gazette*, of the 14th ult., states that His Excellency has made the following barristers of Ontario "Her Majesty's Counsel learned in the law":—Valentine Mackenzie, Brantford; Richard Bayley, London; Salter Jehoshaphat Vankoughnet, Toronto; James Tilt, Toronto; William Purvis Rochford Street, London; George Milnes Macdonnell, Kingston; John Bain, Toronto; Frederick Drew Barwick, Toronto; Hugh McKenzie Wilson, Brantford; Robert C. Smyth, Brantford; James Joseph Foy, Toronto; Walter Gibson P. Cassels, Toronto; Norman Fitzherbert Paterson, Port Perry; Thomas Horace McGuire, Kingston; Henry J. Scott, Toronto.

A barrister (not made "learned in the law" by the command of His Excellency) reading

the *Gazette* in our sanctum, laid it down with the loyal ejaculation, "God save the Queen."

There was a time when to be made a Queen's Counsel was an honor which a hard working barrister might hope to attain after years of patient and honorable toil. That time has passed, and silk gowns are now flung about without the slightest reference to that high standing and ripe experience at the outer Bar which used to be requisite in this Province and which is still the rule in England, and even without that long and successful service in the other branch of the profession, the holding of some important public position, the authorship of legal text-books of value, or any one of those other claims to the distinction which have, in this country, been a sufficient excuse from departing from the old rule. We do not say that this is applicable to all the names on the recent list, but we do say that, with the exception of some four or five which the profession will readily recognize, the appointments are simply inexplicable. Whilst no one grudges the honor, so far as the recipients personally are concerned, we have not yet found one man in the profession who does not say that, with a few exceptions, the appointees are *not* entitled to the distinction, and that others not on the list *are* entitled. This opinion is so universal that various reasons for the appointments have been suggested. Of course some say that politics are the cause, but the remarkable feature of this is that politicians seem to be quite as bewildered and disgusted as the Bar. Like every one else, not excepting, we believe, some of the new silks themselves, we "give it up."

We do not desire to say one harsh word towards those on the list that the profession think ought not to be there, but their appointment is most unfair to those who have already won and obtained, as well as to those who are now striving to win, and hope in due time to obtain, a distinction which used to be reserved for the leaders of the Bar. The uninitiated may, for a short time, be misled by the

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high-sounding and time-honoured letters Q. C. after a name, but that, which has already become valueless in the eyes of the profession, is rapidly becoming only a source of merriment to the public.

We deeply regret to be compelled to make these observations, but it is manifestly not our fault that the standing of professional men, who are, so far as we know, well thought of by their brethren and friends of our own, should thus be unpleasantly discussed by reason of the prominence unhappily given to them; but it is equally clear that a duty is laid upon us in the premises, which, if we failed to perform, we should be without excuse to those who look to us to state what is, beyond question, the voice of the profession on the subject.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

MITCHELL v. CAMERON.

Dominion controverted elections—Judicature Act 1881, (Ont.)—Preliminary objections to jurisdiction of Queen's Bench Division—Entitling of petition.

The petition in this case was entitled in the High Court of Justice (Queen's Bench Division), and was presented to and filed with Mr. A. Macdonell, acting for Mr. R. P. Stephens, Registrar of the said Queen's Bench Division of the High Court of Justice, at his office, at Osgoode Hall, in the City of Toronto. On the preliminary objection to the jurisdiction of the Court, filed by the respondent, Mr. JUSTICE CAMERON held that the petition, not having been presented to any of the Courts mentioned in the Dominion Controverted Elections Act, 1874, *eo nomine*, the same is not before any Court having jurisdiction in respect thereof.

On appeal to the Supreme Court it was

Held, [HENRY and TASCHEREAU, JJ., dis-

senting,] that the Ontario Judicature Act, 1881, makes the High Court and its several Divisions a continuation of the existing Courts, and that the High Court of Justice (Queen's Bench Division) has, under a new name, the same jurisdiction in Dominion controverted election matters as had the old Court of Queen's Bench in virtue of the Dominion Controverted Elections Act of 1874, and therefore that the petition in this case had been properly presented.

D. McCarthy, Q.C., for appellants.

C. Robinson, Q.C., and *Lash*, Q.C., for respondents.

REED v. MOUSSEAU.

43-44 Vict. ch. 9, sect. 9, (P.Q.) ultra vires—Indirect tax—B. N. A. Act, 1867, sects. 91, 92, 65, 126 and 129.

The Legislature of the Province of Quebec passed an Act, 43-44 Vict. ch. 9, by the 9th section of which it is enacted, "And a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever produced and filed before the Superior Court, the Circuit Court, or the Magistrates Court, such duties payable in stamps." The Act is also declared to be an Amendment Act of 27-28 Vict. ch. 5, of the Province of Canada, "An Act for the collection, by means of stamps, of fees of office, dues and duties payable to the Crown upon law proceedings and registrations." And by sect. 3, sub-s. 2, the duties levied under the Act are to be "deemed to be payable to the Crown."

The respondent Reed wishing to test the legality of this tax obtained a rule *nisi* for contempt against the prothonotaries of the Superior Court of Montreal, for refusing to receive and file an exhibit unaccompanied by stamps to the amount of ten cents, as required by the statute.

After the return of this rule the Attorney-General, for the Province of Quebec, obtained leave to intervene, to sustain the legality

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of the tax and contested the rule. On the question whether the tax imposed on the filing of exhibits by means of stamps by 43-44 Vict. ch. 9, was *intra vires* of the Legislature of the Province of Quebec.

Held, [reversing the judgment of the Court of Queen's Bench, P.Q., STRONG and TASCHEREAU, JJ., dissenting,] that the tax in question is *ultra vires* of the Legislature, being an *indirect* tax raised to form part of the consolidated revenue fund of the Province for general purposes.

Per STRONG and TASCHEREAU, JJ., dissenting, that although the duty imposed is an indirect tax, yet that under the authority of sects. 65, 126 and 129 of the B. N. A. Act, the Legislature of Quebec had power to impose the tax in question.

MacLaren, Q.C., for appellant.

Lacoste, Q.C., for respondent.

ANDERSON V. JELLETT.

Disturbance of ferry—Construction of license to ferry.

The Crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville and the township of Ameliasburg."

Held, a sufficient grant of a right of ferryage "to and from" the places named.

Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side to a point across the Bay of Quinte in the township of Ameliasburg, within an extension of the east and west limits of Belleville.

The defendants established another ferry across another part of the Bay of Quinte, from Ameliasburg to Sidney, the termini be-

ing, on the Belleville side, two miles from the western limits of Belleville, and on the Ameliasburg shore about two miles west from the landing place of the plaintiff's ferry.

Held, [reversing the judgment appealed from, STRONG, J., dissenting,] that the establishment and user of the plaintiff's ferry within the limits aforesaid for so many years, had fixed the termini of the said ferry, and that as the termini of the defendant's ferry were over two miles west of the limits of the town of Belleville on the one shore, and over two miles from the landing place of the plaintiff's ferry on the Ameliasburg shore, there had been no infringement of plaintiff's rights.

Bethune, Q.C., for appellant.

C. Robinson, Q.C., for respondent.

Appeal allowed with costs.

MCDONALD V. FORRESTAL.

Consignment of goods subject to payment—Agreement that purchaser shall not sell—Passing property.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Without making such payments, however, A. sold the oil to the defendants without the knowledge of the plaintiff.

Held, affirming the judgment of the Court of Appeal for Ontario, that although the defendants were purchasers for value from A. in the belief that he was the owner of and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil.

Gibbons, for appellants.

Street, for respondent.

Appeal dismissed with costs.

MCRAE V. WHITE.

*Insolvent Act of 1875—Unjust preference—
Fraudulent preference—Presumption of in-
nocence.*

This was an appeal from a judgment of the Court of Appeal for Ontario reversing the decree of the Court of Chancery, which declared a mortgage, executed by one Depew in favor of respondent White, void as being an unjust preference of White over the other creditors of Depew, and ordering White to pay over to appellant, as assignee in insolvency of Depew, the sum of \$465.

Respondent White was a private banker who had, previously to the execution of the mortgage in question, had various dealings with Depew, and had discounted for him, at an exorbitant rate of interest, notes received by Depew in the course of his business. At the time of this transaction, Depew, being a man of a very sanguine temperament, had entered into a new line of business after obtaining goods on credit to the amount of \$4,000 or \$5,000, having represented to the parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to respondent, who advanced him \$300, part of which was applied in paying the over-due interest on the mortgage, and the surplus in retiring a note of Depew's held by respondent.

Depew was granted a reduced rate of interest on his indebtedness to respondent, and was told he would have to work carefully to get through. Depew became insolvent about four months afterwards. In a suit impeaching the mortgage to the defendant, it was

Held, (affirming the judgment of the Court of Appeal for Ontario) that the plaintiff had not satisfied the onus which was cast upon him by the Insolvent Act, of shewing that the insolvent at the time contemplated that his embarrassments must of necessity terminate in insolvency, and that with a view to

that end he had granted the mortgage in question.

Robinson, Q.C., and MacDonald for the appellant.

Gibbons for the respondent.

Appeal dismissed with costs.

QUEEN'S BENCH DIVISION.

In Banco.]

[June 30.]

GIBSON V. MIDLAND RY. CO.

*Railway—Overhead bridge—Death therefrom—
Illegitimate son—44 Vict. ch. 22.*

The plaintiff as administratrix of, sued the defendants, under 44 Vict. ch. 22, sect. 7 O., for the death of her illegitimate son, a brakesman on the defendants' railway, who was killed by being carried against a bridge not of the height required by that Act, while on one of their trains passing underneath it. The bridge belonged to another railway company, who had the right to cross the defendants' line in that way; and though the time allowed by the statute for raising the bridge had expired, they had not done so. The jury found that the defendants had been guilty of negligence in not raising, or procuring to be raised, the bridge.

Held, that the plaintiff was not entitled to recover, (i.) because section 7 of the Act applies only to bridges within the control of the company whose servant has been injured; and (ii.) the Act was intended to give no greater right to recover than Lord Campbell's Act, and therefore the plaintiff's relationship to the deceased prevented her recovering.

MOORE V. CENTRAL, ETC., R. CO.

Railway Co.—Notice requiring lands—Notice of desistment.

Held, that a railway company having desisted once from their notice to take land, given under R. S. O. ch. 165, sect. 20, could not again desist pending an arbitration proceeding under a second notice.

The company's arbitrator having withdrawn from such arbitration in deference to a notice of desistment given by the company, after the amount to be awarded had been agreed upon by the other two,

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Held, that the company could not object to the award on the ground that he had not been asked to sign it.

LEE V. MCMAHON.

Sale of land—False representations—Laches—Counter-claim for purchase money.

The plaintiff induced the defendant to purchase land in Portage la Prairie by exhibiting to him a map representing the property to be in the business portion of the town, and by representing that this was true. The defendant applied to persons on the spot for information, and was told that the representations made were incorrect. But he swore that one of the plaintiffs told him that his informants were interested in depreciating the property, and that on this he purchased, paying \$500 cash and giving a mortgage for the balance. He tried to sell and could have sold the property for more than he gave for it, but did not go to Portage la Prairie for six months after, when he found that the representations were untrue, and repudiated the bargain. This action was brought over the mortgage, and the defendant counter-claimed for the cash payment of purchase money.

Held, [affirming the decision of ARMOUR, J.,] that the defendant was induced to purchase by false representations, and, reversing the judgment, that he had not disentitled himself to relief by *laches*; that the mortgage should be delivered up to be cancelled, and that the counter-claim for the money paid without interest should be allowed, on his re-conveying the estate free from incumbrances done by him.

PYATT V. MCKEE.

Lease by dowress—Purchase by tenant from heirs-at-law—Landlord and tenant's disputes—Landlord's title.

P. being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife (the present plaintiff) and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to the defendant's ancestor, who, at the expiration of his lease, took a second lease, with covenant to deliver up at the end of the term. He purchased the in-

terest of one of the daughters, and a new lease was therefore made to him by the plaintiff, the rent being reduced by one-third because, as it was said, it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term, in 1873, he refused to give up possession.

Held, [affirming the judgment of CAMERON, J.] that the tenant and those claiming under him could not dispute the plaintiff's title without first giving up possession, and that he would not be allowed to say that he was barred, and that the plaintiff was therefore entitled to judgment for an undivided one-third for her life, and *mesne* profits for six years prior to action.

E. K. Cameron, for the plaintiff.

H. J. Scott, for the defendant.

WHIMSETT V. GIFFORD.

Distress for rent—Seizure—Chattel mortgage—Waiver by tenant of formalities.

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant, C. G. The landlord, on the 17th February, 1883, went to the house of the tenant and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again, and told the tenant's wife that the property had been seized for rent, and to let no one take anything away. On 5th March the plaintiff, holding that the goods were going to be sold for rent, took possession under his mortgage, and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent; the bailiff then took the goods that had been removed, and on the tenant's waiving an inventory, (advertising so), sold them within two days to a nephew of the landlord, who gave a cheque which was never presented.

Held, that the landlord's two visits, of the 17th and 24th of February, did not amount to a seizure.

Quare, whether a tenant can waive all statutable formalities as to inventory, etc., as regards the property of a stranger distrained upon. The chattel mortgage contained no re-demise clause, but did contain a clause that the mort-

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gagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods.

Held, that the mortgagee had the right, under the circumstances, to take the goods, although default in payment had not been made.

J. W. Kerr, Q.C., for the plaintiff.

McPhillips, for the defendant.

WHITEMARSH V. VAN EGMOND.

Award—Fraud.

Disputes having arisen between the plaintiff and defendant upon a building contract, the plaintiff wished to have the value of his work for the defendant referred to arbitration. The defendant, who claimed that work was not finished according to contract, agreed only to refer the question whether or not the work had been finished according to the plans and specifications in the contract, and that any submission to be drawn was to be referred to his solicitor, and approved by him before he would execute it. The plaintiff procured a bond to be drawn and sent to the defendant's solicitor, who disapproved of it, as it left the whole matter open to arbitration, and referred it to the plaintiff's solicitors. The latter acting on the instructions of the plaintiff's agent, who was informed of the disapproval, engrossed the bond, and the plaintiff's agent took it to the defendant and procured his signature by leading him to believe that it had been approved. After an award was made thereunder the defendant discovered from his solicitor, for the first time, that he had never approved of the submission, and immediately repudiated it.

Held, [reversing the judgment of *GALT*, J.] that an action on the award would not lie.

Osler, Q.C., for the plaintiff.

Bethune, Q.C., for the defendant.

WILBY V. STANDARD INSURANCE CO.

Fire insurance—Encumbrances—Misrepresentation—Divisible condition.

A fire policy contained a condition, in addition to the statutory conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were incumbered by mortgage without the consent of the company, or if the property should be

levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered, "\$5,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company. After the policy a mortgage was given to secure endorsements, and was discharged, and another was given by the plaintiff to his partners, who retired from the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, and a verdict was entered for the defendants.

Held, that the representations as to incumbrances was a violation of the condition, and that the verdict was right.

Per *HAGARTY*, C. J.—Though that part of the condition as to levying might be unreasonable, (5 App. R. 605), the remainder was not, and the condition is divisible.

REGINA EX REL BRINE V. BOOTH.

Municipal Act—Liquor license—Councillor—Partnership.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother in order to qualify as a councillor, but the business continued as before.

Held, [affirming the decision of the Master in Chambers,] that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. cap. 181, sect. 28, none of which had occurred here. That the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor.

Per *ARMOUR*, J.—The Act disqualifying a licensee should be construed strictly, and its effects should not be extended to the partner of a person lawfully holding a license in his own name.

Shepley, for the appeal.

Ayleworth, contra.

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COUNTY OF BRUCE V. MCLAY.

Registrar—Dismissal during year—Return to municipality—Liability for excess of fees.

The defendant was Registrar of the County of Bruce, and, during the year 1882, was discharged from office. The plaintiffs brought this action for the recovery of the proportion of the amount of fees received by him up to the time of his dismissal, in excess of the amount allowed to be retained by him pursuant to R. S. O. cap. 111, sect. 104.

Held, [affirming the judgment of GALT, J.] that the dismissal of the defendant during the year did not deprive the plaintiffs of their right to recover the excess, which right does not depend upon the return to be made in each year.

HARREN V. YEMEN.

Mortgage—Second mortgage—Power to second mortgagee to pay arrears on first mortgage and distrain—Purchase by second mortgagee under power in first mortgage—Distress.

The plaintiff mortgaged his land to the L. L. and S. Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company the defendant should be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default was made, and the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land expressed to be under the power of sale in the company's mortgage.

Held, that the plaintiff's estate having paid the mortgage debt to the company in full, the defendant could not be said, by means of his purchase contract, to have paid the interest in arrear so as to entitle him to distrain therefor.

A. H. Lefroy, for plaintiff.

J. K. Kerr, Q.C., for defendant.

COUGHLIN V. CLARK.

Promissory note—Repeal of Stamp Act—Pleading—Amendment.

Action on a promissory note which, at its making, was not stamped, but had been double

stamped before action, and after the repeal of the Stamp Act the defendant denied the making of the note. At the trial leave to plead the sufficient stamping was refused on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations showing the consideration.

WILSON, C. J., gave judgment for the plaintiff.

Held, that the judgment was right.

Per HAGARTY, C. J.—The learned judge was not bound to allow a plea of insufficient stamping to be added by way of amendment under the circumstances.

Per ARMOUR and CAMERON, JJ.—The amendment should have been allowed. The note, even if unstamped or insufficiently stamped, was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such use of it.

Per CAMERON, J.—It is necessary, under the Judicature Act, to plead specially want of stamps. The unstamped note was, in its inception, valid, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before those Acts were passed, and the note being originally a valid transaction is now valid.

REGINA V. BENNETT.

Temperance Act, 1878—Information—Waiver.

An information was laid against the defendant, on 28th December, 1883, (*sic*) for having, on 25th December, sold intoxicating liquor in violation of the Canada Temperance Act. Upon a search made intoxicating liquor was found on the premises on 1st January, 1883. On this evidence the information was amended so as to charge the keeping and not the selling. The defendant was present at the amendment and waived an adjournment, and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the Clerk of the Peace and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction the same in all respects as the first with the exception that it was for keeping for sale intoxicating liquors. This was also returned and filed.

Held, that he had power to draw up and return the second conviction.

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Held also, that there was no variance between the evidence and the information to warrant an amendment, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him.

Held also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only.

JOHNSON V. HEIRS.

Limitation of actions—Possession of dowress.

C. R. died intestate in 1864, seised in fee simple of the land in question, leaving him surviving, his widow and several heirs-at-law. The widow remained in possession from the time of the husband's death until her own decease in 1881, and cultivated the farm. There was some evidence that she kept possession, with the consent of the heirs, for them, but the Court was of a contrary opinion. There was no evidence of a written acknowledgment of their title. She devised the land to the plaintiff.

Held, that the possession of the widow was not a possession of a dowress, and that the title of the heirs-at-law had been thereby barred.

The Statute of Limitations begins to work against the heirs-at-law in favor of a dowress in possession at the expiration of her days of quarantine.

ONTARIO INDUSTRIAL L. & S. CO. V. LINDSEY.

Registry of instrument not authorized by Registry Act—Cloud on title—Damages—Parties—Notice of action to registrar.

S. believing that his father (still living but of unsound mind) was entitled to certain lands to which the plaintiff claimed title, took the advice of his solicitor C., who was advised by counsel, and following his advice instructed C. to prepare and register an instrument whereby he, S., stated that he claimed the lands, and would, upon the demise of his father, commence proceedings for their recovery. This being done the plaintiffs were obstructed in the sale of their lands, and brought an action against S. C. and the registrar to remove the instrument from the title as being a cloud thereon, and for damages.

PROUDFOOT, J., dismissed the action as against the registrar, but awarded judgment with a reference to assess damages against S. and C.

Held, that Registry Act did not contemplate the registration of such an instrument, and, CAMERON, J., dissenting, that an action would lie for its removal.

Per CAMERON, J.—The instrument being void on its face, as being wrongfully registered, resort to a court is unnecessary, and the action should be dismissed.

Per HAGARTY, C. J., and ARMOUR, J.—The act of registration was a wrongful one, and all parties combining in it are therefore responsible to the plaintiffs, and the registrar was therefore a proper party.

Per HAGARTY, C. J.—There being no *mala fides* the damages should be nominal.

Per CAMERON, J.—The registrar was not a proper party, having acted in good faith and within the scope of his duty; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client after consulting counsel.

Per ARMOUR, J.—No notice of action to the registrar was necessary.

COMMON PLEAS DIVISION.

IN BANCO.

CARTWRIGHT V. HINDES.

Ca. Sa.—Setting aside—Reviewal by Court—Misleading statement in affidavit—Residence.

Held, that the Divisional Court may review the action of a judge setting aside a writ of *capias ad satisfaciendum*, and the arrest thereunder, as also the action of the judge who made the order to arrest.

Held also, from the evidence set out in the case, on objection taken that the defendant was not a resident of Ontario, was not tenable, as it sufficiently appeared that he was such resident; also that a statement made in the affidavit on which the order to arrest issued, that the defendant had made "an assignment of all his property," without adding the words, for the general benefit of creditors, was a misleading statement as inducing a belief that the assignment had been made for a fraudulent purpose, and therefore, on such ground, the order could

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not be supported, but that this was immaterial because the affidavit was to justify the order.

Aylesworth and *Machar*, (of Kingston,) for the plaintiff.

MacLennan, Q.C., for the defendant.

COCHRAN V. BOUCHER.

Chattel mortgage—Collateral security—Principal and surety—Premature sale—Damages.

Action for wrongfully seizing, and selling, and depriving plaintiff of her right to redeem certain goods. C. being pressed by executions against him procured one H. to undertake to pay same on C. giving him a promissory note made by himself and his wife, the wife being merely a surety for her husband, for the amount of the executions, and also a chattel mortgage similarly made as collateral security for the payment of such note. H. discounted the note with a bank, and with the proceeds paid the executions. Subsequently, and while the note was held by the bank and before its maturity, H. claiming that there had been a breach of the mortgage by the removal of some of the goods from the country, (which was disproved, the jury having found that the removal was by the plaintiff's son claiming the right to do so), and refusing to allow the mortgagors to redeem, insisted on selling the whole of the mortgagors' goods to pay off other claims in addition to the mortgage, and realized a sum more than twice as large as there would be any pretence for. There was sufficient goods of the husband to satisfy the claim, and of the goods actually seized under the mortgage, even after satisfying the mortgagee, there was a sum of \$137.50 residue of the plaintiff's goods sold.

Held, the note being the principal security, and the mortgage merely an accessory to it, while the note was outstanding in the bank's hands they were entitled to the mortgage, and H. could not proceed under it, and failing that, the wife, being a surety, her goods should not, under the circumstances, have been sold; but even assuming that H. sold under the authority he had, the note being premature, the plaintiff would be entitled to recover the value of her interest in the goods, and that the finding of the jury, that \$275 and the actual value of such interest, could not be complained of.

Lash, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

RADFORD V. MERCHANTS BANK.

Bank—Warranty on sale of machine—34 Vict. ch. 8, sec. 40, D.—Res judicata.

Action against the defendants, a bank, for damages for breach of warranty on the sale of a machine.

Held, under sect. 49 of the Banking Act, 34 Vict. ch. 8, D., which prohibits banks dealing in the buying and selling of goods and merchandize, an action for the alleged warranty was not maintainable.

Held also, that the matter was *res judicata*; the question having been tried in the Division Court in an action on certain notes given for the price of the machine, and decided against the now plaintiff.

E. H. Smythe, (of Kingston), for the plaintiff.

Britton, Q.C., for the defendant.

GARSON V. GARSON.

Specific performance—Agreement between father and son.

The plaintiff, who had been living with his father on the father's farm of 100 acres, having, in 1871, left to work for himself, the father wrote to him that if he would come home he would give the plaintiff 50 acres and a share of the cattle and sheep when the plaintiff got married, and by staying away he would not only sacrifice his own but the father's interests also. Upon the receipt of the letter the son returned home, and remained there ever since, working it with the father, except at certain seasons, generally at harvest time, when he went away and earned wages. It was proved that the father had indicated the 50 acres the plaintiff was to have, and that the plaintiff had erected a house thereon with the father's sanction and approval, and was occupying it with his wife and family, he having married in 1879.

Held, that the plaintiff was entitled to have the agreement specifically performed.

Falconbridge, for the plaintiff.

Shepley, for the defendant.

LEADER V. NORTHERN RY. CO.

Railway—Carriage of goods—Right to warehouse.

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D., a brewer,

in Toronto, and shipped same by the defendants' railway, signing a consignment note, and receiving a shipping receipt from the company, the barley being consigned to W. D. at Brock Street Station, Toronto, subject to certain conditions. The barley was duly carried to Toronto and warehoused by the defendants in their elevator under, as they contended, the right conferred therefor by the conditions in that behalf, and then tendered grain of same grade as plaintiff's, which the consignees refused to accept.

Held, that the consignment note and shipping receipt, which constituted the contract between the parties, showed that a distinction was made between grain consigned to, and that not consigned to the defendants' elevator, and that the condition as to warehousing was only applicable to grain shipped to the elevator, and not to grain shipped as the grain in question was.

The plaintiff was therefore held entitled to the damages sustained by the non-delivery of the specific grain shipped by him.

Creasor, Q.C., for the plaintiff.

Boulton, Q.C., for the defendant.

HAMES V. JOHNSTON.

Division Courts Act—Notice of action—Personal service—Computation of time.

Sect. 31 of the Division Courts Act enacts that any action or prosecution against any person for anything done in pursuance of the Act shall be commenced within six months after the fact was committed, etc., and notice in writing of such action, and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

Held, (1) that personal service was not required, but that the service on the wife was sufficient. (2) That the section does not require the court in which the action is to be brought to be mentioned in the notice; and *semble*, even if such were required the statement contained in that notice in question, that the action would be brought in the High Court of Justice, without naming the particular division, was sufficient. (3) That in computing the time within which the action must be brought, the day on which the fact was committed must be excluded.

Dunbar, (of Guelph), for the plaintiff.

Osler, Q.C., contra.

KILLIKER V. MCGIBBON.

Vessel, sale of—Loss of—Liability.

The defendant purchased the interest of the plaintiff in a certain vessel, under an agreement which did not comply with the formalities of the Act respecting the transfer of vessels. After the agreement had been entered into, the captain, who had been appointed by the owners, deserted the vessel. Whereupon the defendant took possession, and appointed one Glass as captain, and while under his charge and through his negligence, the vessel was lost.

Held, that the plaintiff could not recover from the defendant the price of loss under the agreement, there having been no valid transfer, but that he was, however, entitled to recover the value of his interest, for that the defendant under the circumstances, was responsible for the captain's negligence, and therefore liable for the loss thereof.

McMichael, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

WALLACE V. HUTCHINSON.

Husband and wife—Dower—Separate estate.

In an action against a married woman, married in 1871, on a promissory note made by her, the only property which she was proved to possess was a right to dower in lands of a former husband. The learned judge, at the trial, having directed that the defendant's separate property, vested in her or in a trustee for her at the date of the note and at the present date, should be charged with the payment of the plaintiff's claim, a motion was made to the Divisional Court to set aside such direction, but the court refused to interfere.

J. E. Rose, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

REGINA V. FEE.

Deputy judge—Validity of appointment—Presumption—R. S. O. ch. 42—Absence from county.

The defendant was convicted for perjury alleged to have been committed in a cause tried at a Division Court, held by one H., under a commission issued by the Governor General in Council, appointing him Deputy Judge of the

County Court of the County of Victoria, during pleasure and the absence of the County Judge under the leave of absence granted to him by an order in council.

Held, that it was not necessary for the Crown to prove the order in council granting the leave of absence, for its existence, and that the commission had not become effete by lapse of time, would be presumed in accordance with the general presumption of law that a person acting in a public capacity was properly appointed and duly authorized to act, and the *onus* of showing the contrary is on the defendant.

Held also, that the commission was valid under R. S. O. ch. 42, and that it was not essential that the County Judge should be absent from the county.

J. G. Scott, Q.C., for the Crown.

Osler, Q.C., for the prisoner.

BENNETT V. THE GRAND TRUNK RY. CO.

Railways—Accident—Crossing on railway premises—Liability—C. S. C. ch. 66, sects. 104, 145—Evidence—New trial.

A track crossing on the railway company's premises for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within sect. 104 of C. S. C. ch. 66, so as to require the statutory signals to be given when crossing such road; but still due care must be taken to prevent damage being sustained by reason of such crossing.

Held also, that sect. 145 applies to the railway company's grounds in cities, towns, and villages, as well as to the limits outside such grounds.

On the merits the Court were of opinion that the verdict which was rendered for the plaintiff was contrary to the evidence, and a new trial was directed.

Fullerton and Schoff, for the plaintiff.

Bethune, Q.C., for the defendants.

THE QUEEN V. GOUGH.

Criminal law—Indictment—Omission to charge offence done "feloniously"—Quashing indictment.

An indictment professing to be under 32-33 Vict. ch. 22, sect. 45, charged that the defendants "did unlawfully and maliciously maim

and wound, by shooting them, two horses, the property of," etc.

Held, the offence should have been charged to have been done feloniously, and that the indictment was therefore bad, and must be quashed.

E. H. Smythe, (of Kingston), for the prisoner.

J. G. Scott, Q.C., for the Crown.

LUCAS V. KNOX.

Dower—Quarantine—Necessary attendance and companionship.

Held, that the right of a dowress during quarantine is not merely a personal right, but she is entitled to have reasonable and proper attendance and companionship.

Frank Arnoldi and Burdette, (of Belleville), for the plaintiff.

Noithrup, (of Belleville), for the defendant.

THE REAL ESTATE LOAN AND DEBENTURE CO. v. THE METROPOLITAN BUILDING SOCIETY.

Purchase of securities for bulk sum - Deficiency in statement as to value of single security—Right to recover—Fraud.

The plaintiffs and defendants entered into negotiations for the purchase by plaintiffs of certain securities, consisting of mortgages and other assets of the defendants, on the basis of an eight per cent. investment, and a schedule was prepared by defendants giving each security. Finally a purchase was agreed on at a lump sum of \$40,000, but on the basis of the value of the securities contained in the schedule. Subsequently and after a deed of assignment of the securities had been executed, the plaintiffs discovered that one of the securities was \$780 less in value than was stated, and the plaintiffs claimed to recover this amount from the defendants.

Held, that there could be no recovery, for that the evidence showed that the lump sum agreed on was to cover all deficiencies, and errors and mistakes in value, at all events, to a reasonable amount, which the sum stated was, and there was no fraud or misrepresentation proved.

J. K. Kerr, Q.C., and *A. C. Galt*, for the plaintiffs.

Robinson, Q.C., for the defendants.

Burton, J. A.]

THE VICTORIA MUTUAL FIRE INS. CO. V.
DAVIDSON ET AL.

*Principal and surety—Division Court clerk—
Change in duties—Discharge of sureties—
Entry in books—Evidence.*

After defendants had become sureties for a Division Court clerk a special arrangement was made between the plaintiffs and the clerk, under which the clerk was to receive no costs, but disbursements only in all suits in which nothing should be realized, and the clerk guaranteed in all cases that the court had jurisdiction. This arrangement was subsequently altered by giving to the clerk fifty cents besides disbursements, and it was arranged that the clerk should make periodical statements. Statements were rendered from time to time, and a cheque, given for the balance, shown. It was afterwards discovered that these statements were not correct, and that moneys collected had not been paid over to the plaintiffs. In an action by plaintiffs against defendants on their bond,

Held, that the settlements were not conclusive.

Held also, that by the special agreement made the sureties were discharged.

The cases deciding that entries in the books of an officer are evidence in his lifetime as against his sureties, questioned.

Hagarty, C. J.]

STANTON V. CORPORATION OF ELGIN.

Board of Audit—County attorney's fees—Disallowance of items in, by Provincial Treasurer—Reduction by Board of Audit from subsequent account—Mandamus.

One C. was charged and committed for trial on twenty-five separate charges of larceny. On being brought before the County Judge he elected to be tried by jury, and at the ensuing assizes was tried and convicted on three of the charges, the others not being tried. Under an order in council the County Attorney is entitled, in cases of felony, to a fee of \$4 on receiving and examining all information and other documents, etc., connected with criminal charges for the Court of Assize, etc., upon the Crown Counsel's certificate that such fees should be allowed. The County Attorney obtained the Crown Counsel's certificate, and in his account charged a fee

of \$4 on each of the twenty-five cases which was audited by the Board of Audit and passed; but on the Provincial Treasurer disallowing twenty-two cases, and his decision being communicated to the Board, they made an order deducting the amount disallowed from the County Attorney's subsequent account.

Held, that a *mandamus* would not lie requiring the Board of Audit to rescind their order, for the disallowance by the Provincial Treasurer was a good reason for their so deducting the amount, their doing so or not being a matter for their discretion.

A fee of fifty cents is allowed to the County Attorney for services in the County Judge's Criminal Court for attendance and service in Court, and making necessary entries for each prisoner not consenting to be tried without a jury. In C.'s case the twenty-five charges were especially read over to him, and his election taken, the County Attorney attending and making the necessary entries. The County Attorney charged fifty cents in each of the twenty-five cases, but only fees in three cases were allowed by the Board of Audit, the Board declaring that the additional must be claimed from the Government, and subsequently the Board disallowed absolutely this additional sum. The Provincial Treasurer having disallowed such amount.

Held, that a *mandamus* would not lie.

The County Attorney claimed to recover \$100 for an affidavit verifying jurors' book, and \$100 for certificate which he drew up for County Judge to sign.

Held, that these fees could not be allowed, and therefore a *mandamus* would not lie here either.

Read, Q.C., for the applicant.

Bain and Raines, (St. Thomas), for the Board of Audit.

J. G. Scott, Q.C., for the Attorney General.

CHANCERY DIVISION.

Wilson, C. J., C. P. D.]

[June 6.]

RYAN V. FISH.

Dower Act—Damages for detention—Damages for mesne profits—Tout temps prest—R. S. O. c. 55—O. J. A. s. 19, subs. 10.

Held, where the plaintiff in an action for dower has endorsed a claim for damages for detention of dower, then, though the tenant of the

freehold appear and admit he right to dower, she may, nevertheless, go on and recover damages for the detention.

The Dower Act, R. S. O. c. 55, has been construed too rigidly, and without giving due effect to the very proper enactment, sect. 45, that in cases not otherwise provided for by the Act, the pleadings and proceedings shall be regulated by the law as it was relative to suits and actions of dower before August 10, 1850. There is nothing in the general enactment of the Dower Act, and certainly not with the aid of the 45th section to prevent the plaintiff from recovering her damages if she has claimed them, and is entitled to recover them.

Held also, R. S. O. c. 55, has not taken away or diminished the right of the dowress to damages against all persons and in all cases where they were recoverable here before August 10, 1850; and such damages are general damages as well for what are called *mesne* profits as for detention; and such general damages are covered by and included in the words "damages for detention of dower" in R. S. O. c. 55, or such general damages are not taken away by that Act, but are saved by sect. 45, and may be recovered by the law as it was before August 10, 1850, as "a case not otherwise provided for" by the Revised Statutes.

Held further, although no one but an heir or devisee can plead *tout temps prest* in an action of dower, because the feoffee of the heir or anyone claiming in the *per* had not the freehold immediately on the death of the husband, and so could not at all times from her death have been ready to render the dower, yet damages for detention of dower against a tenant in the *per* are not in every case to be computed from the death of the husband. For since, under O. J. A. s. 19, subs. 10, equity is to prevail; and since, under R. S. O. c. 55, s. 3, the tenant of the freehold has it in his power to offer to make an assignment of dower, a tenant may, at all events now, be permitted to plead he has at all times since he became tenant of the freehold, been ready and willing to render the plaintiff her dower, and if the plaintiff desire to avoid that plea she should reply a demand and refusal; which reply, if duly proved,

Semble, damages would only be computed against the tenant from the date of the demand.

J. Bethune, Q.C., for the plaintiff.

Z. Lash, Q.C., and *King*, for the defendants.

Boyd, C.]

[June 20.

DUNLAP V. DUNLAP.

Conveyancing—Habendum—Mistake.

When the evidence showed that A. and his son, B., desired to effect a settlement of a landed property, embodying an agreement substantially as follows:—That B. should remain with A. on the place, and, if he did so, the land should be his on A.'s death; that A. should be the proprietor and have authority over the place while he lived; that B. should work the land and provide suitable maintenance thereon for A., and besides pay him \$45 a year for life, and also pay certain legacies six years after A.'s death. But the parties employed a quack conveyancer to draw the deed of settlement, who failed to provide for many of the essential provisions of the agreement, and as to the land, made A., in consideration of natural love and affection, grant the land to B., his heirs and assigns, *habendum*, "to have and hold the same after the decease of A. unto and to the only proper use and behoof of the said A. his heirs and assigns for ever;" and now brought this action for waste against A.

Held, the deed was not void, as passing only a freehold to commence *in futuro*, for the *habendum* is not essential to a deed, and the granting part of the deed was sufficient of itself to pass the immediate freehold to B. The consideration of blood-relationship expressed in the deed was sufficient to carry the use to B., and the deed, viewed as a covenant to stand seized, would vest the entire estate in B.; but *quære*, whether, according to the reasoning in *Goodlittle v. Carter*, 5 B. & Cr. 709, the express limitation of the use in the *habendum* after A.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in B., and the use of so much of the estate as was not expressly limited, (*i. e.*, here for the life of A.), result to and vest in A.

Held, further, however this might be, the deed did not express the true agreement of the parties and could not be allowed to stand; but B., having acted on the faith of the arrangement for some years, and being willing to carry out the original bargain, and execute proper instruments, the deed should not be set aside, but should be amended, and, if necessary, settled by the Master.

Danger of employing unlearned conveyancers commented on, and the expediency of throwing safeguards round the practice of conveyancing in some such way as is done in Manitoba pointed out.

PRACTICE CASES.

Armour, J.]

[June 5.

MACNEE V. ONTARIO BANK.

Division Courts—Rule 285 O. J. A.—Prohibition.

The County Judge of the County of York, acting as Judge of the First Division Court in that County, upon the application of the defendants, made an order, under Rule 285 O. J. A., for the examination of a witness *de bene esse*, and dismissed a subsequent motion by the plaintiff to set it aside.

The plaintiff then moved for an order for a writ of prohibition to prohibit the said Division Court proceeding, and admitting, at the trial, the evidence taken under the order on the ground that the County Judge had not any jurisdiction to make the order.

Held, that the County Judges may, in their discretion, apply the rules of the O. J. A. to the Division Courts, and that the County Judge had jurisdiction to make the order complained of.

G. Bell, for plaintiff.

W. Barwick, for defendant.

Boyd, C.]

[June 18.

THOMPSON V. THOMPSON.

Interim alimony—Time.

Alimony only runs from the service of the writ where no delay has taken place. This does not mean that the plaintiff should take the full time allowed by the rules of Court, but should be diligent in the conduct of the suit and expedite it as much as possible.

H. Cassels, for the plaintiff.

Hoyles, contra.

Cameron, J.]

[June 19.

BANK OF NOVA SCOTIA V. LA ROCHE.

Motion for judgment under Rule 80 O. J. A.—Slay of proceedings.

An action upon a promissory note, commenced by writ of summons. By the endorsement it appeared that the plaintiffs resided at Winnipeg.

After appearance and on the 1st of June, 1883, the plaintiffs obtained a summons from the local judge at Belleville, returnable on the 6th June, to show cause why final judgment should not be signed against the defendant under rule 80, O. J. A. On the 5th June the defendants obtained a *præcipe* order for security for costs. On the 6th June the plaintiffs obtained a summons to set aside the order for security for costs. On the 8th June the plaintiffs moved absolute their summons to set aside the order for security for costs, and for leave to sign judgment; to which no cause was shown except that the proceedings were stayed by the order for security. The local judge set aside the order for security, and gave leave to the plaintiffs to sign final judgment in the action.

Upon appeal to CAMERON, J.—

Held, that the order for security was of as much binding force as if it had been made on an application to a judge or master, and the moment it was served it suspended all proceedings. That the defendants have no defence on the merits is not a ground upon which to move to set it aside.

Held also, that the application for security for costs was made at the proper time.

Order of the local judge rescinded, with costs to be costs in the cause to the defendants in any event.

Clement, for the defendants.

Aylesworth, for the plaintiffs.

Boyd, C.]

[June 19.

NORTH OF SCOTLAND V. BEARD.

Præcipe judgment of foreclosure—Order for immediate payment.

W. Barwick, for the plaintiff, moved for a direction to the Registrar of the Chy. Div. to insert in a *præcipe* judgment of foreclosure in a mortgage suit, an order for immediate payment of the amount due by the defendant under his covenant up to judgment. The registrar to take

the account where a reference to the Master as to subsequent incumbrances is also sought.

BOYD, C., *held*, that the usual course must be followed, and that the defendant should be ordered to pay the amount found due forthwith after the Master shall have made his report.

Proudfoot, J.]

[June 25.]

EXCHANGE BANK V. NEWELL ET AL.

Taxation—Solicitor and client—Appeal—Rule 407 O. J. A., G. O. Chy. 642.

An appeal by two of the defendants from the certificate of taxation of the Local Master at St. Thomas, upon a taxation, at their instance, of their solicitor's bill of costs.

Held, that two clear days notice of appeal, under Rule 407 O. J. A., is insufficient, as G. O. Chy. 642 requiring seven days notice to be given, applies to these cases. Appeal dismissed with costs.

Caswell, for the appeal.

Hoyles, contra.

Cameron, J.]

[June 26.]

CHRISTIE V. CONWAY.

Interpleader—Scale of costs—Appeal from Master in Chambers to a Judge in Chambers.

An interpleader matter. Execution issued for a very much larger amount than \$400, but the subject of the issue was under \$400 in value. The trial of the issue was directed to take place in the Superior Court.

Upon a motion to finally dispose of the costs of the issue the Master in Chambers awarded the claimant the costs, and ordered them to be upon the County Court scale.

Aylesworth, for the claimant, appealed from this order.

A. Cassels, for the execution creditor, contra, contended (1) that there is no appeal from the Master in Chambers upon the question of costs in an interpleader proceeding, except to the Divisional Court. (2) That the Master's order was right and in accordance with the decision of the Chancellor in *Beaty v. Bryce*, 9 P. R. 323, and, at all events that no appeal would lie without the leave of the Master.

Held, that there is an appeal to a judge in Chambers from the decision of the Master in

interpleader. The rule which prevents the decision of the Master, in the exercise of his discretion, being reviewed, cannot be invoked in a case like this where the right of appeal is unrestricted.

Held, that the costs should be on the Superior Court scale.

Beaty v. Bryce, 9 P. R. 320, dissented from.

Proudfoot, J.]

[June 27.]

KEMPT V. MACAULAY.

Mortgage.

This case was re-argued on appeal before PROUDFOOT, J., who upheld the Master's order.

Cameron, J.]

[July 3.]

FLETCHER V. NOBLE.

Bond for security for costs—One surety—Sufficiency.

An action upon promissory notes brought in the C. P. Div. of the H. C. J.

An order was made by the Master in Chambers that the plaintiff do, within four weeks from the service of the order, give security on his behalf in the penal sum of \$400 to answer the defendant's costs of action.

The Registrar of the C. P. D. disallowed the bond filed by the plaintiff in compliance with this order, on the ground that there was only one obligor therein. Upon appeal, on the 29th June, 1883 :

CAMERON, J.—I think the practice of the Court clearly requires that such security should be by bond or instrument under seal, and that it must be to the satisfaction of the Master, but, though usual, the practice is not universal, that there must be two sureties and I see no valid reason why two sureties for so small a sum as \$400 should be required. By Rule 429 O. J. A. the matter would seem to be one of discretion in the Court or Judge. . . I am of opinion therefore that the Registrar was quite justified in his refusal to allow the bond, but as he did so solely on the ground that there was only one surety, and not by reason of the security in other respects being insufficient, I think the matter must be sent back to him to determine whether the security is sufficient without reference to the practice requiring two sureties to join in the

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BUILDING AND LOAN ASSOCIATION V. HEIMROD.

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bond, and, if sufficient, he should allow the same. Costs to be costs in the cause.

J. B. Hands, for plaintiff.

E. A. Forster, for defendants.

Cameron, J.]

[July 3.

THORNTON V. CAPSTOCK.

Slander—Statement of claim.

R. M. Meredith, for the defendant, moved absolute a summons (refused by the Local Judge of the High Court at London) for further and better particulars than those already served, of the times and places where and circumstances under which the defamatory words in the third paragraph of the plaintiff's statement of claim set forth, are alleged to have been spoken and published, or that the second paragraph be struck out.

T. Macbeth, for the plaintiff, showed cause.

CAMERON, J.—I am of opinion that, in an action of slander, it is not sufficient now to allege, in the statement of claim, merely that the defendant falsely and maliciously spoke and published of the defendant the defamatory words complained of, but that the time or occasion when, place where, and persons to whom or in whose presence they were spoken, should be stated with reasonable certainty. It is essential that a statement of claim should disclose all facts necessary to show a legal cause of action. In slander the mere allegation that the defendant falsely spoke and published of the plaintiff certain defamatory words, setting them out does not show a cause of action.

The summons must be made absolute; costs to be costs in the cause.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

TENTH DIVISION COURT OF YORK.

BUILDING AND LOAN ASSOCIATION V.
HEIMROD.

*Division Courts—Practice under Judicature
Act—Nonsuit.*

The Division Courts, so far as they have machinery, should grant the substantial relief, redress, or remedy that the High Court could grant, but the practice of

the High Court under the Rules, except Rule 489, does not apply *ex vi termini* to Division Courts.

The discretion conferred by sect. 244, D. C. Act, to introduce Superior Court practice, can only be exercised in cases unprovided for by the D. C. Act and Rules of Court thereunder.

Held, that as the Division Court Act provides for the granting a nonsuit, the meaning of which, at the time of passing the Act, was a default only, and did not prevent the plaintiff bringing a fresh action, Rule 330 of the Judicature Act, which makes a nonsuit a judgment on the merits, does not apply to the Division Court, nor is it a case for the exercise of the discretion allowed by sect. 244 of the D. C. Act.*

(Toronto, June 15.—McDOUGALL, J.J.)

Before the time appointed for payment of interest under a mortgage made pursuant to R. S. O. 104, by defendant to plaintiffs, an action upon the covenant to insure was brought to recover a premium of insurance paid by the mortgagees, the plaintiffs, on behalf, as it was alleged, of the defendant. The case was tried before J. E. Robertson, Esq., acting judge, and a nonsuit was ordered to be entered on the ground that such action could not be brought until after the time for the then next ensuing payment of interest on said mortgage: R. S. O. 104, 8 ch. B. sect. 12.

After that time a second action was brought for the said premiums under the same covenant. There had been no steps taken to set aside the nonsuit, and more than fourteen days had elapsed since the first trial.

T. P. Galt, for the defendant, objected that the nonsuit had the same effect as a judgment on the merits under Marginal Rule 330, O. J. A., and that the plaintiffs had no longer any right of action. The learned judge before whom the case was tried, reserved the point which was subsequently argued before him in Chambers.

T. P. Galt, for defendant.

Allan Cassels, for plaintiffs.

MACDOUGALL, Co. J.—This is an action brought to recover the premium for an insurance effected by the plaintiffs upon some property of the defendant, of which the plaintiffs are mortgagees. The mortgage is made in pursuance of the Short Forms of Mortgages Act, R. S. O. cap. 104, and contains the usual statutory covenants.

* (See *Pryor v. The City Offices Co.*, L. R. 102, B. 1). 504, as confirming some of the views expressed in the following judgment, reported since it was delivered.—EDS. L. J.)

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The first objection taken by the defendant to the plaintiffs right to recover is, that the plaintiffs had been nonsuited in a former action brought against him by the same plaintiffs, in this Court, for the same cause of action. The ground of nonsuit, it appears, was that the plaintiffs had been premature in beginning their first action, the statutory period mentioned in the extended form of covenant to insure, not having expired.

The defendant contends that under the present rules and practice of the Courts, introduced by the Judicature Act, such judgment of nonsuit is final, and is equivalent to a judgment upon the merits for the defendant, citing Marginal Rule 330 of the Judicature Act.

This contention involves the consideration of the very important question as to how far the rules and practice of the Superior Courts, as altered by the Judicature Act, affect the practice heretofore observed in the Division Court.

The only express provisions I find in the Judicature Act affecting Division Courts are sects. 77, 78 and 80 of the Act, and Marginal Rule 489 of the Rules of Court in the schedule attached to the Act. For the purpose of this enquiry, however, we must look also at certain other rules and sections affecting the County Courts with a view to discover the intention of the legislature, and so form a conclusion as to how much, if any, of the practice laid down in the Act and rules, can, by implication, be imported into the inferior Courts. Rule 490 extends the "pleadings, practice, and procedure of the High Court of Justice to the County Courts wherever the present pleadings, practice, and procedure of the County Courts correspond with those of the Superior Courts of law."

The Division Court is a Court created by statute, (4 & 5 Vict. cap. 53; 13 and 14 Vict. cap. 53; R. S. O. cap. 47; 43 Vict. cap. 8). It is not a Court of Record, (R. S. O. cap. 47, sect. 7), but its judgments have the same force and effect as the judgments of Courts of Record. The Court, therefore, is simply the creature of the statutes constituting it, and to these statutes and the rules subsequently enacted, under powers granted by sects. 237, 238, 239, 240 and 241 of the Revised Statutes, and to any other enactments passed from time to time by the legislature, expressly made applicable in whole or in part to Division Courts, we must look to ascer-

tain the practice and procedure which shall govern. There is this qualification, however, to the foregoing statement; sect. 244 of the D. C. Act enacts that "in any case not expressly provided for by this Act, or by existing rules, or by rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the Superior Courts of Common Law, to actions and proceedings in the Division Courts." What this discretion may mean exactly it is perhaps difficult to determine in any particular case, but where a County Judge attempted to exercise it, by making an order for the examination of a defendant under sect. 24 of the A. J. Act of 1873, Chief Justice Wilson (then Mr. Justice Wilson) granted a writ of prohibition on the ground that the provisions for the examination of parties were *above* the jurisdiction of Division Courts, and on the ground that such a practice would unreasonably increase costs. The learned judge further added, "that he would not sanction a practice being introduced into these Courts in which the judge decides according to equity and good conscience, so unsuited to their constitution and purpose *without direct legislative authority*." *In re Willing v. Elliott*, 37 U. C. R. 320.

On the other hand it was held by Mr. Justice Cameron that it was a proper exercise of this discretion to make an order for security for costs in a Division Court case where the plaintiff resided out of the jurisdiction, on the express ground that it being a matter of practice (not a rule of law) within the principle of practice in the Superior Courts, it was competent for a Division Court Judge to resort, in his discretion, to the practice in those Courts: *Fletcher v. Noble*, 9 P. R. 256.

Section 77 of the Judicature Act enacts that "Every County and Division Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant, in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall, in every such proceeding, give such and like effect to every ground of defence or counter claim, equitable or legal, (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

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This section, I think, refers only to the complete legal and equitable jurisdiction conferred upon all the divisions composing the High Court of Justice and Court of Appeal, and more particularly set out in section 16 of the Act. It does not purport to deal with the practice; but it enacts that for the purpose of administering complete relief, redress, or affording adequate remedy, the County Courts and Division Courts shall possess, within their several jurisdictions, the same legal and equitable powers as those possessed by the High Court of Justice. This was clearly a necessary provision in the case of the County Court, which had been deprived of its former equitable jurisdiction by the Law Reform Act, (32 Vict. Ont. cap. 6, sect. 4). It might not, perhaps, be so necessary to enact with reference to the Division Courts which were already Courts of Equity and good conscience, (R. S. O. cap. 47, sect. 54, sub-sect. 2), but doubtless for the purpose of removing all doubts the section was made to extend to all inferior Courts of civil jurisdiction. It does not add to the machinery of the Division Courts, and therefore there will be many cases where, in order to secure remedies or redress which the Division Courts, from lack of territorial jurisdiction or adequate machinery are unable to extend to a suitor, the cause will have to be removed by *certiorari* to the Superior Court. This is provided for by sect. 61 of D. C. Act, and sect. 78 of the Judicature Act will also meet the class of cases where the counter claim or cross relief sought by a defendant exceeds the powers or jurisdiction of the Division Courts.

Section 80 of the Judicature Act enacts that, "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. This clearly, in my opinion, refers only to the rules of law laid down in section 17 of the Act. What then is the effect of the rules set out in the schedule to the Act? Section 53 defines very plainly their application "as to all matters to which they extend," they shall thenceforth regulate the proceedings *in the High Court of Justice*.

This direct and positive limitation, I think, confines their application to that Court alone, except where a rule in express terms is made ap-

plicable to either the County Court or Division Court. In support of this view see Rule 490, (already referred to), which extends the practice and procedure of the H. C. J., with certain limitations, to the County Court: Rule 264 which is directed in express terms to be construed as applying to County Courts: Rule 489, which confers jurisdiction upon County Court and Division Court judges to deal with the question of costs where the Court discovers that they have no original jurisdiction to deal with the subject matter of the suit: and Rule 456, abolishing County Court terms, notwithstanding the general language contained in section 18 of the Act, though it is true that such section is under the head "High Court," and to other rules under the head of "County Court" in the schedule.

The provisions of the D. C. Act, on the subject of nonsuit, are as follows:—Section 81, after stating the mode of procedure at the trial of an action, goes on to say, "and if satisfactory proof is not given to the judge entitling either party to judgment, he may nonsuit the plaintiff; and the plaintiff may, before verdict in jury cases and before judgment pronounced in other cases, insist on being nonsuited." Rule 122 supplements an apparent omission in the statutory clause by giving the judge power to nonsuit in jury cases, even where the plaintiff does not request it.

At law, before the Judicature Act, a nonsuit was regarded as a default only, and not a judgment upon the merits. It was not conclusive of the plaintiffs rights, and he had the opportunity of bringing his action on again, either in another shape or when better prepared with evidence, while if a verdict were once given, and judgment entered thereon, he was forever barred from suing the defendant upon the same ground of complaint: Archbold's Q. B. Practice, 12th ed. 444. The only penalty a nonsuit imposed upon him was the payment of the defendant's costs. It was not a rule of law, but a rule of practice.

This, then, was the meaning and effect of a nonsuit at the date of the passing of the D. C. Act. I do not think, in view of the sections of the Judicature Act to which I have called attention, that any of the Rules of Court in the schedule to the Judicature Act *ex vi termini* govern the practice in the Division Court except such rules as contain express language making them applicable to that Court, *e. g.*, Rule 489.

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Nearly all the procedure regulated by the rules of Court is totally inapplicable to the Division Court; and many of them, if adopted, would effectually abrogate various sections of the D. C. Act, and many of the rules of that Court passed by virtue of the Act. I do not think that it should be held that various clauses of an important Act of Parliament, dealing as it does with the constitution and practice of an existing Court of law, should be considered repealed by anything short of express legislative language.

Having thus expressed my view of the non-application of the Rules of Court contained in the schedule to the Judicature Act, unless they contain express language to that effect, I must now consider whether the effect of a nonsuit, as it was understood before the passage of the Judicature Act, is a case provided for by the D. C. Act itself or its rules, so as to render it unnecessary to exercise the discretion allowed by section 244 of the D. C. Act.

The D. C. Act must be regarded as speaking from the date of its enactment, and the language of its various sections must be construed, so far as the meaning to be attached to particular words is concerned, by reference to the meaning those words had when the subject matter was being dealt with by the legislature. If the word *nonsuit* had a well known significance—namely, that of a *default* only—which did not prejudice the plaintiff from commencing another action, it must undoubtedly be held that it was employed in that sense and with that meaning (unless qualified by express language) wherever it appears in the Act or rules. It has heretofore had the effect attributed to it above, set out by all the judges who have presided over Division Courts, and has become a part of the existing practice of those Courts well known to both suitors and advocates. There has been no express legislative enactment varying that meaning except the language contained in Rule 330 of the Judicature Act, and in my view that rule is confined in its application to the High Court of Justice and the County Court. I do not therefore consider it a case unprovided for by the D. C. Act and rules.

But should my view in this particular be erroneous, I would still consider it the exercising of an unwise discretion to introduce Rule 330 into D. C. practice under the power contained in section 244 of the D. C. Act. I cannot do better than to quote, in support of this conclu-

sion, the language of the learned judge of the County Court of the County of Victoria, in the case of *Cowan v. McQuade*, 19 L. J. N. S. 108, a decision in which I thoroughly concur. It was an application under Rule 80 of the Judicature Act, to strike out a defence in an action in the Division Court and for leave to sign judgment; and the right to follow this practice was urged as being practice that the judge should allow under the discretion conferred upon him by section 244, D. C. Act. "Nothing can be clearer than this," says the learned judge, "that where a judge advances beyond legislation, or in any way carries the law or practice beyond its former boundaries, he must see to it that his extension cannot work injustice; whatever there may be of inequity in the law as he finds it, is no concern of his, but it is his duty not to lay down any rule or make any precedent which he sees may, in cases which would be governed by such rule or precedent, work a wrong. And again, at the conclusion of his judgment, he says: "How far this principle might wisely be applied to the extended jurisdiction, with proper provisions as to costs, is only for the legislature to say; but until it chooses to make some change in the law I shall regard it as the exercise of a sound discretion to leave the matters as it has left them."

The Division Court is the "poor man's" court. In the rural portions of a county the parties are, in a great number of cases, their own lawyers. They enter their claims themselves for suit, without consulting an attorney, who, if employed at all, is generally not consulted until the hearing. As a consequence of this system, the suitor will frequently commence his action before his claim is ripe, or may fail to be prepared with sufficient evidence at the trial to establish his rights. To give a nonsuit the effect of a judgment upon the merits, would therefore, in my opinion, often work an injustice in a court of *equity and good conscience*, and would introduce a practice unsuited to a forum where the laity themselves, either as agents for others or in person, have the same footing by law as the trained and duly accredited barrister or attorney. The penalty of a nonsuit in the Division Court is the payment of the defendant's costs, and I see no reason why a plaintiff, in a Court where there are no pleadings and few technicalities, should not have the right to bring a fresh action where, either through his blundering or his ignorance

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of the rules of law, he has failed to make out his case to the satisfaction of the judge, and has, in consequence thereof, been nonsuited.

In view of these conclusions I cannot give effect to the defendant's objection that the former nonsuit is a bar to this action.

IN THE FIRST DIVISION COURT,
COUNTY OF ONTARIO.

SMITH V. LAWLER.

Division Court—Rule 80, O. J. A.

Rule 80 of the O. J. A. extends to the Division Courts, and the plaintiff is entitled to speedy judgment where it is shown to the satisfaction of the judge that there is no real defence. *Willing v. Elliott*, 37 U. C. R. 320; *Burk v. Britain*, 19 C. L. J. 74; and *Cowan v. McQuade*, 19 C. L. J. 108, commented upon.

[Whitby, April 14.—DARTNELL, J.J.]

This was an application made to the Junior Judge of the County of Ontario, for an order under Rule 80 of the Judicature Act, to strike out the dispute note, and direct judgment to be entered forthwith for the plaintiff.

DARTNELL, J.J.—The facts, as disclosed by the affidavits filed, are quite sufficient to justify the granting of the order asked, provided Rule 80 of the O. J. A. applies to the Division Courts. I have already ruled in several cases that it does, but, since such rulings, two of my brother County Court Judges have given well considered judgments in similar cases, in which, unfortunately, they have arrived at opposite conclusions. It is to be hoped that, at an early date, an appeal may be had in some like case, so that uniformity of practice may prevail throughout the Province upon so important a point.

My brother Clark, of Northumberland and Durham, in a case of *Burk v. Britain*, reported in 19 C. L. J. 74, conceived it his duty to order judgment for the plaintiff, without a trial. He points out "that the spirit of legislation has been for many years past in the direction of sweeping away dilatory defences;" that "the legislature has, from time to time, acknowledged the injustice of permitting debtors, by making a sham defence, to delay their creditors in recovering the amount due;" that "a formal defence ought not to be allowed to hinder a plaintiff if he could show, before the regular

time of hearing, that there was no real defence;" and finally, that, in a certain class of cases, "the defendant has to convince the court that he ought to be allowed to defend, or judgment goes against him." The learned judge was of the opinion that the "presenting an untrue plea being, even temporarily, an obstacle to the recovery of a just debt, is an illustration of the principle." In this I thoroughly agree with him, and, acting under the discretion which is conferred by the 244th (or last) section of the Division Courts Act, I conceive he had authority to order the entry of judgment forthwith for the plaintiff, which he did.

My brother Dean, of Victoria, in the case of *Cowan v. McQuade*, 19 C. L. J. 108, has arrived at an opposite conclusion, deeming that it would not be "a wise or just exercise of the discretion allowed by sect. 244 to introduce this practice." His argument is based both on the ground of inconvenience, and because no provision is made for costs. As to the ground of inconvenience, it is not greater than in other applications necessarily made to the judge at the County town—such as motions for rehearings, orders for substitutional service, change of venue, and many others which will occur to the practitioner. As to the want of provision for costs, that can be easily remedied by a rule to be framed by our Board of County Judges. It seems to me that if it became generally known that a defence merely for time is unavailing, that these defences would rapidly diminish. It is beyond controversy that this is the case in the Superior and County Courts. I submit that it would be inequitable or unfair that a plaintiff, holding a note for say \$199, to which there is no defence, should be in a worse position than one who has a similar right of action for a sum over \$200. In the latter case he would have the right to judgment in a brief space of time; in the former the fact of filing a dispute note might preclude him from obtaining judgment perhaps for several months. I have known cases wherein a plaintiff, in order to obtain speedy judgment, has, at the risk of costs, brought his action in the County Court. For these reasons I think, on the question of discretion alone, that I should follow the *dictum* of my brother Clark rather than arrive at the conclusion of my brother Dean.

The case of *Willing v. Elliott*, 37 U. C. R. 320, is distinguishable from this class of cases,

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BROWN V. BINKLEY—LAW STUDENT'S DEPARTMENT.

because the point in question arose under the Administration of Justice Act, which was not extended to the Division Courts, whereas the Judicature Act is, in express terms, applied, as far as practicable, to the courts of inferior jurisdiction.

But I go further than either of the learned judges.

By section 77 of the O. J. A. it is enacted that every "... Division Court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and *shall* grant in any proceeding before such Court, such *relief, redress, or remedy* . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice." Section 80 extends to *all* courts the rules of law enacted and declared by the same Act. I think the preventing a defendant who has no real defence from using the process of the court to delay a plaintiff in obtaining speedy judgment, is a *relief* to which the latter is entitled, the striking out the dispute note is a *redress*, and the order to enter judgment for the plaintiff forthwith is a *remedy*, all within the spirit, if not the letter, of the Act.

Order accordingly.

SECOND DIVISION COURT, COUNTY OF WENTWORTH.

IN THE MATTER OF BROWN, (Appellant), AND BINKLEY, (Respondent).

Appeal under sect. 50 of the Division Court Act, 1880.

[Hamilton, May 16.

On the complaint before a Justice of the Peace, of the respondent (the master) against the appellant (the servant) for non-fulfillment of an agreement to work for the master for seven months at \$14.00 per month. The servant refused to carry out his agreement, and the master was compelled to hire another man, paying him \$16.00 per month. The Justice ordered the servant to pay the master \$14.00 damages, or in default to be committed to gaol for 30 days at hard labour.

Wyld, for appellant.

WALKER, Deputy Judge.—After a perusal of the various statutes to which I was referred I can have no doubt as to the judgment which I should give on the appeal. I think the con-

victing magistrate has completely misinterpreted his powers in the matter of this complaint. On the complaint of a master for a breach of contract by the appellant for refusing to carry out an agreement to work, the Justice has, by his conviction, ordered the servant to pay to the complainant \$14.00 and costs, and in default to be committed to gaol at hard labour. Assuming that the Con. Stat. U. C. chap. 75, had not been affected by subsequent legislation, the Justice had not power under its provisions to order a payment by the servant to the master, he could only inflict a fine, and the statute provides that the fine should be paid to a public officer and not to the complainant. But the power of the Justice even to inflict a fine has been taken away by the statute 40 Vict. Cap. 35, and on referring to the Revd. Stat. Ont. Cap. 133, we find the power of the Justice is limited to complaints made by the servant against the master, the master being left to his ordinary civil remedy against the servant. If the Justice intended to act under the latter statute (and I presume he did, as the matter was argued before me as if he had, without objection) then the conviction is bad in ordering, in default, the appellant to be committed at hard labour. It has been held that it is *ultra vires* of the Local Legislature to give this power to Justices of the Peace. In my opinion the Justice of the Peace, in making the conviction now before me, was acting entirely without jurisdiction. I allow the appeal of the appellant with costs, which I order and direct to be paid by the respondent to the appellant, and I also order that the said conviction be and the same is hereby quashed.

LAW STUDENT'S DEPARTMENT.

The Benchers in Convocation assembled have appointed the Trinity Term of the Law Society to begin on the third day of September next. The examinations will take place as usual during the three weeks preceding that date.

An embarrassed young lawyer with his first cause appeared before a Washington judge the other day, with his umbrella under his arm, and, in his agitation, kept his hat on. He began his remarks, when the judge kindly said, "Had'n't you better raise your umbrella?" As an exchange says, this would have been a considerate suggestion if mercy really "drop, like the gentle dew, from heaven."

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1883.

The following gentlemen were called to the Bar during this term, namely:—

C. L. Mahony, with honors; P. D. Crerar, with honors. (Mr. Mahony was awarded a gold medal and Mr. Crerar a silver medal.) Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Ed. Poole, M. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gansby, A. D. Kean, D. Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine and J. F. Canniff.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—R. F. Sutherland, A. M. Ferguson, W. Hunter, C. D. Hossack, E. A. Holman, E. J. Bristol.

Matriculants—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward and H. J. Snelgrove.

Junior Class—A. M. Grier, H. D. Cowan, G. H. Douglas, W. E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Cleland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an Articled Clerk.

Trinity Term having been postponed until Monday, the 3rd September, the examinations will take place as follows:—

Primary—Junior Class, Tuesday, 14th August; Graduates and Matriculants, Thursday, 16th August.

First Intermediate—Tuesday, August 21st.

Second Intermediate—Thursday, August 23rd.

Solicitor—Tuesday, August 28th.

Call—Wednesday, August 29th.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From	{	Arithmetic.
1883		Euclid, Bb. I., II., and III.
to		English Grammar and Composition.
1885.		English History Queen Anne to George III.
		Modern Geography, N. America and Europe.
		Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	{	Xenophon, Anabasis, B. II.
		Homer, Iliad, B. VI.
		Cæsar, Bellum Britannicum.
		Cicero, Pro Archia.
1884.	{	Virgil, Æneid, B. V., vv. 1-361.
		Ovid, Heroides, Epistles, V. XIII.
		Cicero, Cato Major.
		Virgil, Æneid, B. V., vv. 1-361.
		Ovid, Fasti, B. I., vv. 1-300.
		Xenophon, Anabasis, B. II.
		Homer, Iliad, B. IV.
		Xenophon, Anabasis, B. V.
		Homer, Iliad, B. IV.
		1885.
Virgil, Æneid, B. I., vv. 1-304.		
Ovid, Fasti, B. I., vv. 1-300.		

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

Canada Law Journal.

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DIARY FOR SEPTEMBER.

1. Sat. . . . Beauharnois, Governor of Canada, 1726.
2. Sun. . . . *Fifteenth Sunday after Trinity.*
4. Tue. . . . Court of Appeal Sittings begin.
8. Sat. . . . Trinity term ends.
9. Sun. . . . *Sixteenth Sunday after Trinity.*
10. Mon. . . . Sebastopol taken, 1855.
11. Tue. . . . County Court Sittings for York begin.
12. Wed. . . . Peter Russell, President, 1796.
13. Thurs. . . . Frontenac, Governor of Canada, 1672. Quebec taken by British under Wolf, 1759.

TORONTO, SEPT. 1, 1883.

WE publish in another column a paper over the signature of "R. W. Wilson," criticising some interesting articles by Mr. Frederick Harrison, on the English School of Jurisprudence, which appeared some years ago in the *Fortnightly Review*. We are glad at all times to encourage discussions on questions of abstract Jurisprudence, the tendency with us being, perhaps, to sacrifice a little too much the theoretical, or we might say, the less obviously practical, to the more obviously practical. While, therefore, we do not concede that Mr. Wilson has succeeded altogether in meeting Mr. Harrison's objections to Austin's definition of law, we welcome his article and hope it will provoke discussion. Mr. Wilson does not appear to us to have comprehended what Mr. Harrison meant by the sovereign power in a community. We take it that the ultimate sovereignty throughout the empire resides in the Crown and Parliament of Great Britain, and that it is entirely correct to say that within the range of *municipal law* there are no limits to the absolute powers of the sovereign, in the sense of the jurispru-
dist.

WE regret to state that at the last moment Lord Coleridge has written to the secretaries of the Committee of arrangements to say that

he cannot come to Canada as he had hoped and intended, his engagements being such as to render his visit impossible. He adds, however, that Sir James Hannen and probably Lord Justice Bowen would be able to go to Toronto in October and would be glad to accept at the hands of our Bar the complimentary dinner which he was compelled to decline. He expressed great sorrow at having to forego a visit which he had looked forward to with so much pleasure. The Committee having been called together passed a resolution echoing the regret; but directing the secretaries to say to his Lordship that as the circuits would be in full swing in October, they did not see their way to tendering a dinner to Sir James Hannen and Lord Justice Bowen. We join our regrets at the course things have taken, as it deprives our Bar of the opportunity of showing our respect in the way intended to one who occupies so eminent a position as that of Lord Chief Justice of England. The thanks of the profession are due to the Committees who took so much trouble to perfect the necessary arrangements for the visit which His Lordship fixed for the 12th instant. We trust that when next a Chief Justice of England comes to this Continent he will not allow anything to stand in the way of his visiting one of the most important and not the least loyal portions of Her Majesty's Dominions.

IN *Monaghan v. Dobbins*, 18 C. L. J. 180, the learned Master in Chambers held that "the provisions of Rule 185 virtually superseded the practice prescribed by Chancery Order 266, and that in every case where it was required to obtain oral evidence in support of a motion in Chambers, an order for

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the examination of the witness must be first obtained." In Holmsted's Manual, p. 206, it was suggested that the proper construction of this Rule was, that it should be deemed to afford an additional remedy rather than as being a substitution for the former procedure under Order 256.

The point we see has been recently before the Court of Appeal in England in the case of *Raymond v. Tapson*, 48 L. T. 403. In that case oral evidence was sought to be given after judgment in reference to the accounts directed to be taken. The plaintiff, without order, issued a *subpœna*, which the witness, under advice of counsel, refused to obey, the contention being that the former practice under the Imp. statute 15-16 Vict. c. 86, ss. 40-41, from which our Chancery Order 266 is taken, had been superseded by the Order 37, r. 4, from which our Rule 285 is taken, but the Court of Appeal decided that the former procedure in Chancery was still in force, and that there was no irregularity. The correctness of *Monaghan v. Dobbins*, therefore, seems now open to considerable doubt.

IN the case of *Meyers v. Kendrick*, 9 P. R. 363, Mr. Justice Osler appears to have adhered stedfastly to the decisions of the Common Law Courts, and following those decisions has determined that where a plaintiff's action is dismissed with costs, the defendant has no right to examine the plaintiff as a judgment debtor, either under the rule of the Supreme Court or the statutes. There seems to be no good reason in principle why a plaintiff who has become liable to pay costs in this way should not be subject to examination, and we are moreover morally certain that the Legislature never intended to make any such exception in his favour; and it seems to us that it is only by a very strict construction of the rules and statutes that the exception is made out to exist. Rule 366 provides that a judgment debtor may be examined touching his estate and effects, and

as to the property and means he had "when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred," and it is said that these words exclude the possibility of the rule being intended to apply to cases where a plaintiff is defeated in his action and ordered to pay the defendant's costs. On the other hand it appears to us it might not unreasonably be said that as soon as a plaintiff issues a writ he submits himself to the jurisdiction of the Court, and incurs "a liability" to pay the defendant's costs in the action if so ordered by the Court, and that this liability for costs, therefore, is one of "the subjects of the action," so far as the defendant is concerned. It may not be the sole subject of the action, and it is not necessary that it should be, otherwise if a plaintiff sued on two promissory notes and recovered judgment on one and failed on the other, he could not examine the defendant because the note for which he recovered judgment would not be "the sole object of the action"—a conclusion which would be absurd. All that the rules or statutes require is that the judgment should be in respect of a liability which was the subject, or one of the subjects of the action in which the judgment is recovered, and it appears to us that a judgment for the defendant against the plaintiff for costs fulfils this condition. It is absurd to say as a matter of theory that the costs are no part of the subject of the action; when as a matter of fact it is well known that in many cases the costs in the end form the most material part of the subject matter in controversy, not only to the solicitors, but to the litigants themselves. Take for instance the celebrated case of *McLaren v. Caldwell*. In that case it is not too much to say the costs will in the end probably form one of the, if not the most substantial parts of the subject of that protracted litigation.

The question of costs appears to us to be a substantial part of the subject of every action; and the case of a defendant recovering judgment against a plaintiff for costs is, to our

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mind, within both the letter and the spirit of the statute and rules. The statute and rules are remedial in their nature and designed to promote the recovery of just debts, and should receive a liberal, and not a narrow, interpretation. We therefore think it is to be regretted that the decision of Spragge, C., in *Lowell v. Gibson*, 6 P. R. 132, was not followed in preference to the common law cases of *Kerr v. Douglass*, 4 P. R. 124; *Walker v. Fairbairn*, 6 P. R. 251; *Ghent v. McColl*, 8 P. R. 428; *Hawkins v. Patterson*, 23 U. C. R. 197.

THE decision of the Queen's Bench Divisional Court in *Johnson v. Oliver* (or *Heirs*), noted *ante* p. 246, appears to us, to some extent, to conflict with the decision of the Supreme Court in *Gray v. Richford*, 2 S. C. R. 431. From our note of the case, it appears that the widow of an intestate who died in 1864 continued in sole possession of the land in question till 1881, when she died, devising the land to the plaintiff. It was held that the widow had acquired a valid title, in fee, to the whole estate, under the Statute of Limitations against the heirs-at-law of her deceased husband. *Gray v. Richford* established the wholesome rule that when a person having a rightful title to possession, is in possession of land, his possession must be attributable to his rightful title, and not to a wrongful one. Now, if this rule were applied in the case of *Johnson v. Oliver* it appears to us that it must follow, that, at all events as to an undivided one-third of the land in question, as to which the widow was equitably entitled to possession in right of her dower, she could acquire no title to the fee simply by possession, as against the heirs-at-law. The want of a formal assignment of dower is in equity of no account, see *Hamilton v. Mohern*, 1 P. W. 122, quoted with approval by Blake and Proudfoot, VV. C., in *Laidlaw v. Jackes*, 27 Gr. 101, and even if it were of any account at law, the rule of equity must, since the Judicature Act, prevail. The proper test

appears to be this: could the widow, during her possession, have been evicted by the heirs-at-law from an undivided one-third? Would not the widow, in equity, have had, even before assignment of dower, a good, equitable title to possession of an undivided one-third as doweress? We think she would, and if we are correct in this, we do not see how, applying the rule laid down in *Gray v. Richford*, she could acquire any possessory title to the fee of that one-third, no matter how long she might remain in possession. We are aware that it was held by the Court of Chancery in *Laidlaw v. Jackes* that a widow, who had been in actual occupation of land of which she was dowable for over twenty years without assignment of dower, had lost her right of action to recover for future dower. As a proposition of law that may have been correct, and that it also worked a grievous piece of injustice to the widow, no one will deny. A legislative remedy has since been applied by 43 Vict, c. 14 (O). At the same time we do not think that case in any way conflicts with the opinion we have ventured to express. *Jackes v. Laidlaw* altogether turned, as to this branch of the case, on construction of R. S. O., c. 108 and 25, which bars the action for dower if not prosecuted within the prescribed time. But the question is whether though the widow might be unable actively to enforce her claim for dower by action, she might not, nevertheless, be entitled to set up her claim as doweress, as a solid defence to an ejectment by the heirs-at-law, to recover possession of more than the undivided two-thirds? Beyond all question this defence, it appears to us, would have been available at any time within the period allowed to the widow for bringing an action to enforce her claim for dower, viz., ten years from her husband's death, and we are also inclined to think it would be a good defence even at any subsequent period of her possession; but whether it would, or not, can the rightful possession be said to have come to an end before the ten years allowed

NEW RULES OF COURT IN ENGLAND—HUMOURS OF THE LAW.

for bringing the action of dower had expired, which would not be until 1874? and if not, then the subsequent possession was insufficient to confer a title.

THE Weekly Notes for Aug. 4 contains in the form of a supplement the new consolidated Rules of Court, dated January 12th, 1883, but not to come into operation until October 24th, 1883. The projected rules have been creating a great stir among the legal fraternity in England. On the one hand the junior barristers, "fresh and hearty," but "impecunious parties," complain that pleadings from which they have been in the habit of making no small gain, are practically abolished, and the newly elected Bar committee has petitioned Parliament to petition Her Majesty to amend them. So likewise have the Incorporated Law Society who complain not only of injury to the interests of solicitors, but also of the fact that they were not consulted by the Judges who framed the rules. In the London *Mail* of 13th ult., will be found an interesting debate in the Commons, arising from the presentation by Sir H. Giffard of these petitions. We purpose reprinting his speech in our next issue, as it will interest many of our readers. It appears that of 1045 rules, 125 are new, and involve very great innovations. Amongst others the equivalent of our Rule 80 is extended to actions for the recovery of land. Then, Rule 285 is as follows: "No demurrer shall be allowed;" Rule 286, showing that the consent of the Court or Judge must be obtained before a point of law raised by the pleading can be disposed of before the trial. Again, much commotion has been raised by Rule 462, which provides that the Judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be enquired into in the cause or matter. So too Rule 368 is startling and has startled. It provides: "Any party seek-

ing discovery by interrogatories shall, before delivery of interrogatories, pay into Court the sum of £5, and if the number of folios exceed five, the further sum of 10s. for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into Court . . . the sum of £5, and may be ordered further to pay into Court as aforesaid such additional sum as the Court or Judge shall direct." It is further complained that a fresh blow has been struck at trial by jury in increased discretion given to the Judges in respect to allowing a jury. We hope in our next number to give our readers further information as to these new rules, which it appears are to come into operation notwithstanding the above mentioned petition.

HUMOURS OF THE LAW.

If any member of the legal profession ever says from his heart, with Burns—

"O wad some power the giftie gie us,
To see ourself as ithers see us."

or utters words to the like effect, he can easily have his desires satisfied by buying and perusing Mr. Browne's book on the "Humorous Phases of the Law." In it Mr. Browne, who is a veritable *belluo librorum* with a perfect *racoes thes scribendi*, shows how law and lawyers have been depicted in literature—and verily the dramatists, novelists, historians, essayists, and moralists which he quotes, were by no means æsthetic in their tastes; they used no neutral tints, but laid on the strongest shades with no sparing hand; they painted as if they had nothing but black upon their palettes.

Too many of those who have in their works touched upon law and lawyers, have forgotten that old Burton called them the oracles and pilots of a well governed commonwealth, and have remembered only that the anatomist apparently, in one of his darkest hours of melancholy, upbraided them as

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"a purse-milking nation, a clamorous company, gowned vultures, thieves, and seminaries of discord . . . irreligious harpies, ramping, griping catchpoles," and have dipped their pens into the same gall and rung the changes upon Burton's phrases. Who can say how many of those who threw so much vinegar into their remarks had reason to remember the heavy hands of the servants and ministers of justice—the queen of all virtues—whom they so abused?

Mr. Browne has produced a book of elegant extracts, and, with the aid of his publishers, an elegant book of elegant extracts. At times he introduces the quotation with such words as may be necessary to enable the reader the better to appreciate it, and sometimes adds notes of illustration, suggestion or protest. He quotes Aristophanes, Terence, Ammianus, Marcellinus, Juvenal, Horace, Martial, and others of the ancients; Quevedo from among the Spaniards; Montaigne, Napoleon, LaFontaine, and others of the writers of France, while he takes tribute from over a hundred of the chief authors of England and America. We are favoured with poetry and prose, and translations both from and in these two great divisions of literature.

In his eight chapters Mr. B. gives us the views of, i. the dramatists; ii. the novelists; iii. the moralists, essayists, historians, and satirists; iv. the poets; and v. the epigrammatists. Then we have, vi. songs, odes, and burlesques; vii. curious imaginary trials; and lastly, viii. something about law clerks and students.

Our author does not quote from Shakespeare, believing that every one knows his bard of Avon as well as Macaulay did his kings of England, (an erroneous supposition we fear), and instead of the trial scene in the Merchant of Venice we have a clever burlesque of it by Mr. Esek Cowen, of Troy, N.Y. *Apr*opos of Dickens, another member of the Trojan bar gives an account of the "proceedings and resolutions of the attorneys and solicitors of London upon the death of

Sampson Brass, Esq., late of Bevismarks." When referring to the suggestion of Cowper, that law reports should be in rhyme, as thereby they would be more likely to be remembered, he quotes the poet as saying, "and, lastly, they would, by this means, be rendered susceptible of musical embellishments, which . . . could not fail to disperse that heavy atmosphere of sadness and gravity which hangs over the jurisprudence of our country;" and then our author cleverly shows how the technical machinery of the law might be made to conform to such a state of things: "In choosing the key, judgments upon the rights of infants would be set in the *minor*, and courts-martial would be conducted in the *major*. Causes involving small amounts of money should be dashed off in a *presto* movement; but large estates, especially where the costs come out of the fund, should be inquired into at the deliberate pace of an *adagio*. Personal actions, such as slander, assault and battery, and particularly breach of promise of marriage, ought to be treated in *flats*. Musical terms might be used to describe legal process and remedies. For instance, an order appointing a receiver might appropriately be indicated by a *bold*; a stay of proceedings by a *rest*; an order of arrest by a *slur*; while a re-argument might properly be called a *repeat* or *da capo*—back to the beginning. The fund in litigation would generally be *diminuendo*, and the costs *crescendo*—to the end. The course of some litigations, in which one judge enjoins another, would be described by a passage full of *accidentals*. Famous music already written could be adapted to the necessities of the law. Thus an argument on the law of descent could well be illustrated by the music of the opera of 'Orpheus'; a trial for murder by poisoning could be preluded by the strains of 'Lucretia Borgia'; a bill of discovery would be adequately set to an air from 'La Somnambula,' in which groping in sleep and darkness is so thrillingly described; those pleas of insanity which inevitably accompany

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the defence of people who avenge their own domestic grievances, would fitly be conveyed in the harmonies of 'Hamlet;' and the ease with which the marriage relation is dissolved in some parts of our favoured country, could be admirably set out by the melodious story of 'Don Pasquale.'"

To burlesque the detailed bills of costs which law and custom insist upon a solicitor rendering, we have an account sent by a tailor to his lawyer for a suit of clothes, and which was designed as a set off against the latter's charges.

Our author points out the ignorance and mistakes of Lever, Reade, Cowper, and others, in matters of law. Warren and his "Ten Thousand a Year" are referred to in terms that appear to us to be scarcely warranted. All know what is said of a lawyer who pleads in his own case, and how unfortunate have been such legal luminaries as St. Leonards, Saunders, C. J., Holt, C. J., and Sir Samuel Romilly, who drew their own wills; so Mr. Browne need not have been surprised into strong expressions because a lawyer who writes a novel makes a false step or two in his law. Lord Lytton submitted the whole case of *Beaufort v. Beaufort*, in "Night and Morning," to counsel, and yet his lordship found that the law of his story was questioned and doubted. Trollope is not a favourite with our author, but Dickens he considers "the most engaging and influential writer of English fiction since Shakespeare."

This book is not one to read through at a sitting any more than is a dictionary, but it is one to be taken up time and time again, and read and re-read, whenever one wishes to know what the great, and the wise, and the good, or the little, the foolish and the bad, have said about the legal profession. It shows great research, extensive acquaintance with the literature of the past and the present, good judgment in the use of scissors, quickness to see a weak spot, readiness to take advantage thereof. Mr. Irving Browne has most certainly not been one of those lawyers

spoken of by Edward Everett, "who do not, in any branch of knowledge not connected with their immediate profession, read the amount of an octavo volume in the course of a season." He gathers honey from every opening flower he can see and from which he can extract anything. If it should again become the fashion to write in hieroglyphics he might with propriety adopt as his autograph an eye and a bee.

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MAINTENANCE.

The July numbers of the *Law Reports* comprise 11 Q. B. D. p. 1-144; 8 P. D. 117-129; and 23 Ch. D. 209-369. The first of these commences with the case of *Bradlaugh v. Newdegate*. It will be remembered that Mr. Newdegate, a well-known member of Parliament, instigated a common informer to sue Mr. Bradlaugh for the penalty imposed by Imp. 29-30 Vict. c. 19, s. 5, for having sat and voted as a member of Parliament without having made and subscribed the oath appointed by that section, &c. It appeared that Mr. Newdegate, after the commencement of the action for the penalty, gave the informer, who was himself a man of no means, a bond of indemnity against all costs and expenses he might incur in consequence of the action. Mr. Bradlaugh now brought the present action against Mr. Newdegate for maintenance, and Coleridge, C. J. in a judgment in which he goes at length into the subject of maintenance, decided that Mr. Newdegate's conduct amounted to maintenance, and that Mr. Bradlaugh was entitled to indemnity from Mr. Newdegate for everything which Mr. Newdegate's maintenance of the informer had caused him. After reviewing the authorities, Lord Coleridge says at p. 9—"It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of

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another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie." And later on he says:—"It is true that this action is of the rarest; very few examples of it in any modern books are to be found. As a rule the doctrines and principles applicable to maintenance are discussed and laid down in judgments upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved from an obligation, on the ground that the contract was void or illegal, or the obligation not binding, because founded upon what was, or what savoured of maintenance. But I think it has been shown, not only from old abridgements and digests and text writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which, in a fit case, the Courts of this day will support."

LIBEL—PUBLICATION OF PRIVILEGED COMMUNICATION BY MISTAKE.

The next case requiring notice is *Tompson v. Dashwood*, p. 43, and is of a peculiar character. The defendant wrote defamatory statements of the plaintiff in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake the defendant put it in an envelope directed to another person, who received and read the letter. The full court now held that the publication was nevertheless privileged. Watkin Williams, J., said:—"The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as a matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question, though there have been cases

to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege." Mathew, J., expressed concurrence.

BILL OF LADING—PERILS OF THE SEA.

The next case *Woodley & Co. v. Mitchell*, p. 47, concerns the question what is and what is not included within the "perils of the sea," in the usual exception in a bill of lading, and the point here decided is sufficiently indicated in the passage in the judgment of Brett, L. J., where he says that "although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels so that without that negligence it would not have happened, is not a peril of the sea within the terms of the exception in a bill of lading."

MALICIOUS PROSECUTION—"REASONABLE AND PROBABLE CAUSE"—ONUS.

The next case requiring notice is *Abrath v. The North Eastern Railway Company*, p. 79, and is a case on a point on which it is said, there was no express authority. It was for malicious prosecution by the defendant of the plaintiff for conspiracy to defraud. The present application was for a new trial on the ground of misdirection. The misdirection was in the learned judge before whom the action was tried stating to the jury that the onus was upon the plaintiff of proving that the defendants did not take the reasonable and proper care to inform themselves of the true state of the case in prosecuting the plaintiff, and that they did not honestly believe the case which they laid before the magistrates. This the court now held to be a misdirection. Grove, J., with whom Lopes, J., concurred, says:—"In *Panton v. Williams*, L. R. 2 Q. B. 169, it was held—and the principle of that decision has been followed in many subsequent cases, and reaffirmed by the House of Lords in *Lister v. Perryman*, L. R. 4 H. L. 521—that it is for

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the Judge to say whether there was reasonable and probable cause, though the jury should be asked to find every fact in dispute which may assist him or he may consider necessary in determining that question. There may perhaps be uncontradicted facts other than these left to the jury, and the Judge no doubt may take these uncontradicted facts into consideration, but it was argued for the plaintiff that, where the defendant undertakes to bring forward facts for the purpose of satisfying not the jury but the Judge that there was reasonable and probable cause for prosecuting, the onus of proving these facts is upon the person who brings them forward. On consideration I am satisfied that this contention is founded upon a right view of the law. The existence of these facts is presumably known only to the defendants. It is impossible for the plaintiff in an action for malicious prosecution to know what course the defendant took to satisfy himself, or by what means he did satisfy himself, of the probable truth of the information conveyed to him, upon which he determined to prosecute. I think, therefore, that the general rule of law should be followed here, which is that the onus rests on the person affirming—the person who for his own purposes asserts facts to the truth of which he pledges himself."

CONVERSION—STATUTE OF LIMITATIONS.

Spackman v. Foster, p. 99, which must now be noticed, was a somewhat strange case on Statute of Limitations. Title deeds of the plaintiffs were fraudulently taken from them and deposited by a third party, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud, to secure the repayment of a loan. The plaintiff on discovering the loss of the deeds in 1882, demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations. The Court now held that until demand and refusal

to give up the deeds to the real owners they had no right of action against which the statute would run. Grove, J., with whom the other judges concurred, said—"Several points were raised in argument, but the only one material to our decision is whether the plaintiff could have brought an action for the detention of the deeds without previously having demanded them. The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as deposit or bailee, bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. . . . On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds."

STATUTE OF FRAUDS, S. 4—PART PERFORMANCE OF PERSONAL CONTRACT.

Next has to be noticed the case of *Britain v. Rossiter*, p. 123, which was decided as far back as 1879, though it does not appear how it is that it only now appears in the *Law Reports*. That case is authority for the proposition that (1), a contract which is not enforceable by reason of the provisions of section 4 of the Statute of Frauds is not therefore void altogether, but is an existing contract; (2), where there is an existing contract, a fresh contract cannot be implied from acts done in pursuance of it; (3), that the doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of section 4 of the Statute of Frauds was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by

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the provisions of the Judicature Act. As to the last point that the equitable doctrine of part performance has not been extended by the Judicature Act, this decision will be found noted among our recent English practice cases. As to the equitable doctrine of part performance, at p. 130, Cotton, L. J., makes some interesting remarks as to what that doctrine really is. He says—"It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract and to permit the other party to change his position, or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some *dicta* of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part payment of the purchase money would defeat the operation of the statute. But it is well established, and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken." But it is a curious thing that at p. 133, Thesiger, L. J., without noticing these remarks of his colleague, says—"I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of equity is based upon the theory that the Court will not allow a

fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service." But that the doctrine of part performance did not comprehend a contract of service all the judges of the Court of Appeal agreed. As to a contract which comes within section 4 of the Statute of Frauds, but does not comply with its provisions being, not void, but only unenforceable, notwithstanding certain *dicta* to the contrary, Lords Justices are also agreed.

The cases in the Probate Division comprise three shipping decisions, which are not of such a nature as to require notice here.

APPOINTMENT OF NEW TRUSTEES.

In the July number of the Chancery Division (23 Ch. D. p. 209—p. 369), *In re Aston*, p. 217, requires a word of notice. In it the practice of the Court where a testator has appointed four trustees in his will, and one is of unsound mind, is declared to be, not to re-appoint the other trustees in the place of themselves and the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust, but to appoint a new trustee in his place.

RESIDUARY ESTATE—VOID BEQUEST.

In the next case of *Blight v. Hartnoll*, p. 218, a testatrix made a will as follows:—"I give to C. H. all my personal property, with the exception of my wharf at L." The bequest of the wharf failed for remoteness. The questions were (1), whether the above was a residuary gift; and (2), whether the wharf fell into the residue. The Court of Appeal decided both cases in the affirmative. As to the first question Jessel, M. R., says—"You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But, however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to

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anybody at all." Hence, he draws a distinction between a case like the present, or a case where a testator says—"I give all my personal estate, except my gold watch, which I give to A., and my leasehold house, which I give to B.," and a case where a testator gives everything to A. except his gold watch and his leasehold estate, and does not give them to anybody else. In the former case there is a true residuary gift, but not in the latter. Having determined that there was in the present case a true residuary gift, the M. R. deals with the second question of whether there was any intention to exclude the void bequest from falling into the residue, according to the usual statutory rule. As to this he says, with his usual force—"It appears to me very difficult to suppose that a testator should intend that a legacy which fails from being void should not go into the residue. Unless you find express words shewing that the testator doubted whether a bequest in his will was void or not, it is impossible to suppose that he contemplated what would happen if the bequest was invalid."

STAY OF PROCEEDINGS—SUIT BETWEEN THE SAME PARTIES IN HOME AND FOREIGN COURTS.

The next case, the *Peruvian Guano Company v. Bockwoldt*, p. 225, was an application on behalf of the defendant that the plaintiffs might be ordered within seven days to elect whether they would proceed with the action, or with proceedings which they had instituted in a Court in France in relation to the same subject matter. It does not seem necessary to notice it here, as it simply applies the principles laid down in *M'Henry v. Lewis*, L. R. 22 Ch. D. 397, a case which was noticed at length, *supra*, p. 145, and which Lindley, L. J., characterises here as "a most valuable decision."

VOLUNTARY SETTLEMENT—GROUNDS FOR SETTING ASIDE.

The next case to be noticed is *Dutton v. Thompson*, p. 278, in which the plaintiff sought to have a certain voluntary settlement of his property set aside which he had executed at the suggestion of the defendant, his

uncle and trustee of the settlement, and as it appeared that the plaintiff was very weak minded, and had not understood what he was doing, the relief asked for was granted. Jessel, M. R., made the following remarks on the general subject involved:—"I think the deed cannot stand, on the ground alleged in the statement of claim, namely, that the plaintiff did not understand it. I emphatically disagree with the ground on which some judges have set aside voluntary settlements, viz., that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a Court of Justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper."

VENDOR AND PURCHASER—WAIVER OF OBJECTIONS TO TITLE.

The last case in the July number of the Chancery Division to be noticed here is *In re Gloag and Miller's contract*, p. 320, wherein Fry, J., lays down the law as follows:—"When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shown. But, if the contract expressly provides that a good title shall be shown, then, inasmuch as a notice by the vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he could still be entitled to insist on a good title." He also, holds in this case that if the contract con-

FREDERICK HARRISON ON THE ENGLISH SCHOOL OF JURISPRUDENCE.

tains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver.

A.H.F.L.

*FREDERICK HARRISON ON THE
ENGLISH SCHOOL OF
JURISPRUDENCE.*

Austin's analysis of our primary ideas of law is vigorously attacked by Frederick Harrison in the *Fortnightly Review* of October and November 1878. With the keen pen of an accurate analyst, the writer attempts to show that the school of legal philosophers represented by Bentham and Hobbes in the earlier stages of its growth, by Austin in the more recent, is incorrect in the fundamental analysis it makes of the elements of which a law is composed. The school is ably represented in its comparatively early history by Bodin, whom Hallam terms not inaptly the Aristotle and Machiavelli of France. While the germs of the analysis that this school has continued to claim as all-comprehensive and, therefore, unimpeachable, are to be found in Bodin's definition of law, it remained for Hobbes and Bentham to develop the theory in concert, and for Austin, by force of his clear-cut style of analysis, to clarify what was previously but dimly scrutinised and to commend to the judicial judgment of all who examined it the definition and analysis of law that now bears the impress of his authority. Let us recall the main points of Austin's theory, and then note the objections urged against it by Harrison. A sovereign or supreme power is essential to law in order to give it nascent authority. It involves accord-

ing to Austin a command, a sanction and a legal obligation or duty. The supreme authority may be of different degrees, as, for example, that of the Government of a province, limited, as it is, to its own local sphere. The Dominion Government is supreme as regards the exertion of its constitutionally given powers. The Imperial Government is supreme with regard to all powers not constitutionally granted to colonial governments. But as the essential principle of constitutional government is reasonable limitation, the supreme power, of whatever degree it may be, is subject to this check. Harrison appears to lose sight of this important fact, when he states that there are no limits to the absolute power of the sovereign within the range of *municipal law*, nor does he improve his position when he adds explanatorily "or, in other words, to the lawyers there are none." The sanction, it should be observed, is different according to the circumstances of the case. In civil codes, it is the absence of the benefit derivable from following the explicit directions of the code. In criminal codes, it is the punishment or penalty that follows the violation of the law. Now this leads to the chief objection to Austin's definition that some laws are merely directory or enabling and appear at first sight to involve no command. They do not order a thing to be done. They merely regulate the method of doing it. They are regulations rather than laws. And yet they are imperative in their own way, and partake of the nature of a command. To direct how a thing shall be done is virtually to order that it be not done in any different way. Harrison's objection may therefore be met by including in the definition the idea of prohibition as well as of a command. The sanction in such cases is the imperative effect of the act if done in a manner different from that which is laid down in the Statute. The duty or obligation, being the third element in the analysis, is found in the moral responsibility under which the public labour to do whatever the enabling

RECENT ENGLISH PRACTICE CASES.

or directory statute regulates whenever the interest of the public require it. The ballot provides for secret voting. It does not enjoin compulsory voting. The method to be observed by the voter in recording his vote is laid down. The voter is prohibited from voting otherwise than as the Statute provides. The sanction is here the nullification of the vote if the regulations are not complied with. The duty or obligation is to secure secrecy as far as possible. But there is no positive *command* to vote. There are regulations therefore that involve a prohibition, a sanction, and a duty or obligation. Harrison endeavours to show that three elements named in the analysis of Austin do not of necessity constitute a law, and that there may be a law without the three essentials claimed by Austin. Does not the substitution we propose of a prohibition instead of a command in the case of regulations solve the difficulty? When enabling clauses or directory amendments are appended to positive enactments, then there are both commands and prohibitions involved in the law, and in fact the law is complex, being both a command and a regulation. In forming a system of jurisprudence it is desirable to avoid technicality. The choice between technicality and practical feasibility should in every case be made in favour of the latter. Happily the spirit of the age is innocently utilitarian in this regard. The adoption of the English system of procedure in our courts marks a stage in the geological formation of our laws. If some fossil remains should happen to be found therein, they may be of interest to the student of law in its historical aspects, while they are comparatively innocuous in the statutory structures in which they occur. By degrees they are chipped out and laid aside as curiosities, while the formations in which they occur will remain intact. It is not by over-refining that jurisprudence will become scientifically established—rather by placing a broad and liberal ideal before the jurist, and thereby making all the details of the system

conform as closely as possible thereto. In the description of the reasons why man should obey the law, it should be borne in mind that law invests itself in imperial dignity only when it is ethical in the highest degree. The moral basis for law is not sufficient. It lacks the authority that alone can give it weight. It is simply obvious utility. But the spiritual basis of law not unfrequently inserts a prohibition when utility would issue a command. That no system of jurisprudence, void of this spiritual element can survive the shocks of aggravated wrong, is so palpable a truism as scarcely to need expression. That mere authority founded on precedents must give way—that the self-interested utilitarianism of the age which is quickly “ringing down the corridors of time” must weaken and disappear before a spiritual ethics that will shortly reign in its stead, is the hopeful dream of the true jurist and the conscientious legal philosopher.

R. W. WILSON.

REPORTS

RECENT ENGLISH PRACTICE CASES.

WEBB V. STENTON.

Imp. O. 45, r. 2.—Ont. Rule 370.

Attachment of debt—Garnishee order.

[W. N. 83, p. 108.]

Plaintiff sought to attach, under above rule, the interest of H. under a will, such interest being a share of an income from a trust fund of which the garnishees were trustees, which share was payable half-yearly. At the time when the garnishee order was applied for nothing was due in respect of such annuity in the hands of the trustees.

Held, by Court of Appeal, there was no debt legal or equitable “owing or accruing” from the garnishees within the meaning of the above rule, which could be attached.

RECENT ENGLISH PRACTICE CASES.

RUSSELL v. DAVIES.

*Imp. O. 52, r. 1.—Ont. Rule 396.**Interim order for custody of property.*

[W. N. 83, p. 109.]

This action was brought to recover the arrears of a certain annuity. The plaintiff was in a state of destitution, and Bacon, V.C., made an interim order that the defendant should pay the arrears of the annuity, and continue to pay it until the trial or further order.

Held now, by Court of Appeal, the order could not be supported, it appearing on the evidence that the defendant had a *prima facie* case for insisting that the annuity had determined, and the plaintiff being wholly unable to repay anything if the decision should be against her at the trial.

FRASER v. COOPER HALL & CO.

*Imp. O. 22, rr. 5, 6, 7.—Ont. Rules 164, 165, 166.**Counter-claim—Appearance by defendant to counter-claim.*

[W. N. 83, p. —]

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance gratis, unless and until he has been regularly served with a copy of the defence; and if he appears without having been so served the appearance may be discharged on motion by the plaintiff in the counter-claim.

CHAPMAN v. BIGGS.

*Imp. O. 45, r. 2.—Ont. Rule 370.**Attachment of separate property of married woman.*

[L. R. 11 Q. B. D. 27.]

Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture :—

Held, the moneys in question could not be attached in execution.

Per W. WILLIAMS, J.—It seems to me that, if this form of execution could be obtained under the circumstances of this case, the restraint on anticipation could always be evaded.

IN RE MASON, TURNER v. MASON.

*Imp. O. 16, r. 14.—Ont. Rule 103.**Leave to amend after judgment.*

[W. N. 83, p. 134, ib. p. 147.]

In this case leave was given by CHITTY J. to amend the writ and statement of claim by adding a party defendant to the action after judgment and issue of the Chief Clerk's certificate; but subsequently this order was discharged by the same judge, he considering it doubtful whether the court had power to make an order where the proposed new defendant did not appear upon the application, and consent to being added as a party.

KNIGHT v. GARDNER.

*Imp. O. 38, r. 4.—Ont. Rule 304.**Affidavit—Cross-examination on.*

[W. N. 83, p. 152.]

The party producing deponents for cross-examination upon their affidavits made in proceedings before the Chief Clerk in Chambers, and not the party requiring such defendants to attend for the purpose of being cross-examined, is liable in the first instance for the expenses of their attendance.

THE NORTH LONDON RAILWAY CO. v. THE GREAT NORTHERN RAILWAY CO.

*Imp. J. A. s. 25, subs. 8—Ont. J. A. s. 17, subs. 8.**Injunction—Jurisdiction.*

[L. R. 11, Q. B. D. 35.]

The above section has not given power to a judge of the High Court to issue an injunction in a case where no court before the Judicature Act could have given any remedy whatever.

Per BRETT, L. J.—I personally have a very strong opinion that the Judicature Act has not dealt with jurisdiction at all, but only with procedure . . . Individually I should be inclined to hold that if no Court had the power of issuing an injunction before the Judicature Act,

no part of the High Court has power to issue such an injunction now ; but it is not necessary to decide that.

Aslatt v. Corporation of Southampton, L. R. 16, Ch. D. 143, doubted.

Per COTTON, L. J.—In my opinion the sole intention of the section is this : that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right.

THE CAMPAGNIE FINANCIERE V. THE PERUVIAN GUANO CO.

Imp. O. 31, r. 12.—Ont. Rule 222.

Production—Relating to matters in question in the action.

[L. R. 11 Q. B. D. 55.]

A document which it is not unreasonable to suppose, may tend either to advance the case of the party seeking discovery, or to damage the case of his adversary, should be regarded as a document relating to a matter in question in the action.

Per BRETT, L. J.—I do not think that the Court is bound any more on the second summons than on the first to accept absolutely everything which the party swearing the affidavit says about the documents, but the Court is bound to take his description of their nature. The question must be, whether from the description either in the first affidavit itself, or in the list of documents referred to in the first affidavit, or in the pleadings of the action, these are still documents in the possession of the party making the first affidavit which it is not unreasonable to suppose do contain information which may, either directly or indirectly, enable the party requiring the further affidavit either to advance his own case, or to damage the case of his adversary.

Jones v. Monte Video Gas Co. L. R. 5 Q. B. D. 556, applied and discussed.

BRITAIN V. ROSSITER.

Imp. J. A. sec. 24 subs. 4, 6.—Ont. J. A. sec. 16, subs. 5, 8.

[L. R. 11 Q. B. D. 123.]

The doctrine as to part performance, whereby a contract not enforceable by an action at law

owing to the provisions of the Statute of Frauds, s. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the provisions of the Judicature Act.

Per BRETT, L. J.—I think that the true construction of the Judicature Acts is that they confer no new rights ; they only confirm the rights which previously were to be found existing in Courts either of Law or of Equity ; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

SMITH V. GOLDIE.

Patent—Combination—Novelty—Inventor—Prior Patent to person not inventor—Pleading and practice—Section 6 Patent Act—Use by others in Canada—Use by patentee in foreign countries—Section 28 Patent Act—Final decision—Judgment in rem—Section 7 Patent Act, 1872—Commencement to manufacture before application in Canada—Section 48—Use by defendant before patent—Non-suit in Chancery—Practice.

An invention consisted of the combination in a machine of three parts, or elements, A, B and C, each of which was old, and of which A had been previously combined with B in one machine and B with C in another machine, but the united action of which in the patented machine produced new and useful results.

Held, [STRONG, J., dissenting,] to be a patentable invention. To be entitled to a patent in Canada, the patentee must be the first inventor in Canada or elsewhere. A prior patent to a person who is not the true inventor is no defence against an action by the true inventor under a patent issued to him subsequently, and does not require to be cancelled or repealed by *scire facias*, whether it is vested in the defendant or in a person not a party to the suit.

The words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his applica-

tion in Canada" are to be read as meaning "not being in public use or on sale in Canada for more than one year previous to his application."

Held, also, that the Minister of Agriculture or his Deputy has exclusive jurisdiction over questions of forfeiture under the 28th section of the Patent Act, 1872, and that a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th section, cannot be supported after a decision of the Minister of Agriculture or his Deputy declaring it not void by reason of such breach.

Per HENRY, J.—The jurisdiction of the Commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th section.

Under the 7th and 48th sections of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manufacture before the date of the application.

Held, not entitled to a general license to make or use the invention after the issue of the patent.

The defendant at the hearing of the suit in Chancery, moved judgment by way of non suit at the close of the plaintiff's evidence, and judgment was afterwards reversed on appeal. The Supreme Court declined to order a new trial, but directed a decree for the plaintiff.

Appeal allowed with costs.

Bethune, Q.C., and Howland, for appellant.

Lash, Q.C., and Walter Cassels, for respondent.

BIRKETT ET AL V. MCGUIRE ET AL.

Partners—Giving time to principal—Blended accounts—Payments.

Hulton and McGuire, (defendants,) trading together in partnership, became indebted to Birkett et al, plaintiffs, for goods purchased from them for which the defendants gave notes of the partnership firm. They dissolved partnership in October, 1876, with the knowledge and approval of the plaintiffs, one of them having assisted in arranging it.

McGuire continued to carry on the business alone, and the plaintiffs continued to deal with

him,—in so doing McGuire had several transactions with the plaintiffs, from whom he continued to receive goods on credit, until he became insolvent in the early part of the year 1880,—whereupon plaintiffs brought this action on the notes given by the firm. The circumstances attending the dissolution of the firm of McGuire and Hulton, and the subsequent dealings of the plaintiffs with McGuire, appear in the report of the case in 31 U. C. C. P. 430.

Held, [reversing the judgment of the Court of Appeal, RITCHIE, C. J., and STRONG, J., dissenting,] that Hulton was entitled to a verdict on the grounds that by the course of dealings of the plaintiffs with McGuire subsequently to the dissolution, viz: by plaintiffs blending the two accounts, and by their taking McGuire's paper on account of the blended accounts, upon which paper McGuire from time to time made sufficient payments to pay any balance remaining due on the paper of McGuire and Hulton, which was in existence at the time of the dissolution, it must be held as a matter of fact, as well as of law, arising from the course of the said dealings, that the paper of the firm of McGuire and Hulton had been fully paid.

Appeal allowed with costs.

MacKelcan, Q.C., for appellants.

McCarthy, Q.C., and Bruce, for respondents.

CHANCERY DIVISION.

Wilson C. J. C. P. D.]

[June 6.

MITCHELL V. SYKES.

Factor—Power to sell for repayment of advances without special authorisation—Power to sell by auction.

A., a manufacturer, borrowed money from B., and agreed with B., in writing, that B. should have the selling of the goods manufactured at his A's. factory; that A. should give B. a mortgage on the factory and premises to secure \$5,000, and interest to be advanced by B., and should furnish B. all the goods manufactured at the factory, and manufacture the same to the satisfaction of B., and ship the same to B., as B. directed, at such times, and in such reasonable quantities as he from time to time should direct, and should pay B. a *del credere* commission of 7½ per cent. for selling the same and interest at 8

per cent. on all moneys advanced by B. over the \$5,000, and A. covenanted, as his orders were filled, and the goods received, to advance in cash to B. 75 per cent of the wholesale trade value of such goods, and for that purpose the said goods were to be invoiced to B. at such value that he, B., could sell them to the best advantage. It was agreed, also, that all goods manufactured at the factory should be sold only by or through the plaintiff.

Held, the above agreement constituted B. a factor, not a pledgee, for he had power to sell without regard to any default in payment in the ordinary course of trade.

Held, further under the interest that B. had in the goods, and from the nature of the dealings and arrangements of A. and B., that if A. did not repay the advances made to him, or did not deliver to B. goods sufficient to keep his advances protected by a surplus of 25 per cent. of goods at the wholesale trade value, and it became necessary for B. to protect himself against such default, and he could not within a reasonable time have sold to customers, that he could sell by auction, and was not bound to delay until private sales could be made.

Watson for the defendant.

Bain, Q.C., for the plaintiff.

Ferguson, J.]

[June 23

CAREY V. THE CITY OF TORONTO.

Vendor and purchaser—Sale according to a plan—Rights of purchaser—Parties.

The City of Toronto sold certain leasehold building lots by public auction, which building lots formed three sides of a square. A plan of the land was exhibited at the sale, and copies given to the bidders, and the sale was made according to the plan which was incorporated in the contracts of purchase. There was shewn on the plan three lanes running round the three sides of the square, at the rear of the building lots. The plaintiff bought a lot on the south side of the square. M. bought all the lots on the west side of the square. After the purchase M. endeavoured to close up the lane behind the lots on the west side of the square.

Held, the plaintiff was entitled to the benefit of the lanes on all three sides of the square, and to a lease in accordance with the plan according

to which he made his purchase; and he had a right to maintain this suit to compel M. to remove fences placed by him in obstruction of the lane behind the lots purchased by him, M., and that without making all the other purchasers at the sale parties.

S. H. Blake, Q.C., for the plaintiff.

C. Moss, Q.C., for defendant, A. Macdonell.

McWilliams for the City of Toronto.

D. Clarke for the defendants, the Bennetts.

Proudfoot, J.]

[July 4

CLARKE V. CORPORATION OF THE TOWN OF PALMERSTON.

This was an application for a mandamus to compel the Corporation of the Town of Palmerston to include in the estimate by-law for 1883, and to levy and collect a cause to be levied and collected the sinking fund, properly leviable for 1883 on all the debenture debt of the Corporation; and to levy and collect the arrears of the sinking fund not levied in former years; or to levy such a rate as would not exceed two cents in the dollars, exclusive of school rates, applying such portion of said rates as should exceed the amount for ordinary expenditure towards the arrears of sinking fund: and to continue the levying and collection of the two cent rate, similarly applying the excess until all arrears of sinking fund should be made up.

Held, the order for a mandamus should go for the levy of the rate for the current year, for the proceedings were properly taken against the Corporation, and not the Clerk of the Municipality, notwithstanding sec. 88 of the Assessment Act, R. S. O. c. 180 (Harr. Mun. Man., 4th Ed. p. 692), and *Grier v. St. Vincent*, 13 Gr. 512. For R. S. O. c. 180, s. 88, must be taken in connection with s. 340 of the Municipal Act (R. S. O. c. 174), and the Clerk is not to insert in the collector's roll any sums which the Council has not directed to be levied. The Council would not know how to limit the rates to be imposed to keep within the statutory limit, unless it had all the special rates also before it.

Held, however, the mandamus could not include the levy of the arrears, nor the levy of the rates in future years.

The not levying a rate for the sinking fund is

Chan. Div.]

NOTES OF CANADIAN CASES.—CORRESPONDENCE.

an annual breach of duty, and upon any breach a right arises to have it corrected.

Held, also, the plaintiff was entitled to his costs, for though he had not got all he asked, yet he had got what the defendants would not give him.

C. Robinson, Q.C., for respondents.

Proudfoot, J.]

July 6.

KITCHING v. HICKS.

Chattel Mortgage—Registration—R. S. O. c. 119.

K. having become security for repayment by H. of a sum of \$600, an agreement in writing was entered into, that in consideration thereof, H. did assign to K. all his rights and claims to the goods and stock-in-trade in his, H's., store to an amount sufficient to re-imburse K. for what he might pay as such surety. "And should there not be stock enough for that purpose in the store at such time" the balance should be made up out of H's. book debts.

The agreement was not registered, and K. did not take possession of any of the goods.

Held, the agreement was void as against creditors under R. S. O. c. 119, for want of registration, for although a mortgage of goods and chattels, which are of such a nature that possession cannot be given, is not within the statute, yet where the security covers goods and chattels of which possession may be given, as well as future goods, it must be registered. Otherwise, the statute makes it absolutely void, and it cannot be upheld as to the other part of which possession cannot in the nature of things be changed at the time of making the deed.

Held, also, that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment.

Parkes v. St. George, 2 O. R. followed.

Magee for the plaintiff.

Akers for the defendants, Clarkson and Houston & Co.

Meredith for the defendant Hicks.

Proudfoot, J.]

[July 19.

M'GREGOR v. KEILLOR.

Evidence—Surveyor's field notes—Acts of occupation—Statute of limitation.

To determine a disputed boundary line between two lots, the field notes of S., a land sur-

veyor, were offered in evidence, but the evidence was objected to because the memoranda in the notes did not appear to have been made by S. in the execution of his duty :

Held, the objection was good, and the evidence inadmissible.

The plaintiff and M., his next adjoining neighbour, in 1868 employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the line, and he and the owners of the adjoining land recognised the line so drawn as the division line.

Held, a sufficient occupation by the plaintiff to give him a title by possession.

Harris v. Mudie, 7 App. 414, distinguished.

CORRESPONDENCE.

Errors in Law Reports.

To the Editor of the LAW JOURNAL.

SIR.—I beg to call the attention of the Law Society of Ontario, as well as of the profession generally, to the inaccuracies and blemishes to be found in our Law Reports. It will be admitted by all that they should be as complete and perfect as possible. There is no good reason why they should not be free from inaccuracies arising from careless proof-reading, much less from want of sufficient attention on the part of both reporters and editors. In the course of my reading I have noticed the following defects :—
O. R., Vol. I, Nos. 7, 8, 9, p. 494, "mortgagee's fraud in obtaining money" should read "*mortgagor's* fraud in *effecting policy*." O. A. R., Vol. VII, Nos. 10 and 11, "\$15 and costs" should read "\$135 and costs"; Chancery Reports, Vol. XXVIII, Nos. 11 and 12, *Direct Cable Co. v. Dominion Telegraph Company*, the expressions, occurring frequently, "*Defendant Company*" and "*Plaintiff Company*" are obvious results of carelessness in proof-reading. The Supreme Court Reports might fairly be expected to be models of accuracy, and yet in Vol. VI, No. 1, we find on page 10, "appeal dismissed with costs" where, as the judgment in the case (*Power v. Ellis*) shows, the appeal is *allowed* on the same terms. In Vol. V, No. 1, *Aetna Life Ins. Co. v. Brodie*, the fact that HENRY, J. dissented should be indicated in the head-note,

CORRESPONDENCE—LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

and that FOURNIER, J. agrees with the majority judgment but, as to costs, would award costs of both lower courts to the Appellants.

In the first of the above S. C. cases, (*Power v. Ellis*;) it is also to be noted that on page 5, *Defendant* (l. 2.) should read *Plaintiff*. Apart from these and other blunders that might be cited, there are many improvements that might be suggested in our reports. The marginal headings given in most of our best edited texts are a very great assistance. Could they not be adopted with benefit to the profession in our reports?

In my opinion our reports should be so prepared, edited and printed as to be a source of pride and satisfaction to Canadian lawyers and jurists. They ought to be a "possession for ever."

Very respectfully yours,

VERITAS.

Lord Coleridge's Visit.

To the Editor of the LAW JOURNAL.

SIR,—All the arrangements for the reception of this distinguished judge by the Bar of Ontario had been made. The programme of his movements as arranged by the committee of the New York Bar Association, both as to America and Canada, has been officially announced, and is published in England as well as the States. The time for his visit to Toronto was fixed by his Lordship, and the New York Bar Association and the secretary of our Bar Committee duly notified. Everything was ready and every one very willing except, apparently, the Chief Justice, who, we are informed, now writes a note to the secretary of the committee in Toronto, that he cannot come to Canada. I suppose he has gone on the principle "if you can't take a liberty with a friend with whom can you," and that therefore this liberty is intended as a compliment. I do not think the Bar of Ontario will look upon it in that light. We should have thought his Lordship might very reasonably have said to those who have him in charge, that occupying the representative position he does he could not, after he had made a distinct promise, acted upon to his knowledge by those interested, throw aside an engagement made with the Bench and Bar of the noblest province of the British empire.

The strangest part of the affair is that the New York Bar Association has been in correspondence with our civic authorities urging them to give the Lord Chief Justice a hearty reception and making suggestions in connection therewith. It would seem, therefore, not to be the fault of the New York Bar. It is reported, moreover, that these gentlemen are paying all Lord Coleridge's expenses. There is a good deal in this that grates on my old fashioned nerves. Everything being ready, however, for the banquet, I would suggest that as the great services of most of the recently appointed Queen's Counsel, both to the profession and their country, have not yet been full recognized, it would be a graceful act to tender to them, ere the vegetables become cold, the dinner which was prepared for the Chief Justice. I should like to see the gentleman who recommended these appointments to the Minister of Justice, included as a guest. It is feared, however, that his modesty will for ever prevent his identity being discovered.

Yours, &c.,

BARRISTER.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

CONTRACTS :—

Principles of Contract, being a treatise on the general principles concerning the validity of agreements in the Law of England. Third edition. By F. Pollock. Stevens & Sons.

EQUITY :—

Commentaries of Equity Jurisprudence founded on Story. By T. W. Taylor, Q.C. Willing & Williamson.

MERCANTILE LAW :—

A compendium of Mercantile Law. By J. W. Smith. Ninth edition, by G. M. Dowdeswell. Stevens & Sons.

PERSONAL PROPERTY :—

Principles of the Law of Personal Property, intended for the use of students in conveyancing. By Josh. Williams. Eleventh edition. H. Sweet.

In the case of *In re Browne and Binkley*, reported *ante* p. 259, the learned Deputy Judge who heard the case says that it has been held *ultra vires* the Local Legislature to give power to a Justice of the Peace to imprison with hard labour. If the reference is to *Reg. v. Frawley*, that holding was reversed by the Court of Appeal : 7 O. L. R. 246.

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1883.

The following gentlemen were called to the Bar during this term, namely:—

C. L. Mahony, with honors; P. D. Crerar, with honors. (Mr. Mahony was awarded a gold medal and Mr. Crerar a silver medal.) Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Ed. Poole, M. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gansby, A. D. Kean, D. Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine and J. F. Canniff.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—R. F. Sutherland, A. M. Ferguson, W. Hunter, C. D. Hossack, E. A. Holman, E. J. Bristol.

Matriculants—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward and H. J. Snelgrove.

Junior Class—A. M. Grier, H. D. Cowan, G. H. Douglas, W. E. Hastings, A. D. Scatcherd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Cleland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an Articled Clerk.

Trinity Term having been postponed until Monday, the 3rd September, the examinations will take place as follows:—

Primary—Junior Class, Tuesday, 14th August; Graduates and Matriculants, Thursday, 16th August.

First Intermediate—Tuesday, August 21st.

Second Intermediate—Thursday, August 23rd.

Solicitor—Tuesday, August 28th.

Call—Wednesday, August 29th.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From	Arithmetic.
1883	Euclid, Bb. I., II., and III.
to	English Grammar and Composition.
1885.	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
1883.	Cæsar, Bellum Britannicum.
	Cicero, Pro Archia.
	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
1884.	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
1885.	Homer, Iliad, B. IV.
	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

LAW SOCIETY.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1883 { Emile de Bonnechose, 1884 { Souvestre, Un
1885 { Lazare Hache. 1884 { philosophe
sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnett's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

Williams' Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

Three Scholarships can be competed for in connection with this intermediate.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this intermediate.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.

Easter Term, third Monday in May.

Trinity Term, first Monday in September.

Michæmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michæmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m.

The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Benchler during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees.....	\$ 1 00
Student's Admission Fee.....	50 00
Articled Clerk's Fee.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " ".....	100 00
Intermediate Fee.....	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions.....	2 00
" Diplomas.....	2 00
" Certificate of Admission.....	1 00
All other Certificates.....	1 00

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Canada Law Journal.

VOL. XIX.

SEPTEMBER 15, 1883.

No. 15.

DIARY FOR SEPTEMBER.

- 16. Sun.... *Seventeenth Sunday after Trinity.*
- 17. Tue.... First U. C. Parliament met at Niagara, 1792.
- 19. Wed.... President Garfield died, 1881.
- 20. Thurs.. Lord Sydenham, Governor-General, died 1841.
- 23. Sun.... *Eighteenth Sunday after Trinity.*
- 24. Mon.... Guy Carlton, Lieutenant-Governor, 1766.
- 29. Sat.... St. Michael's Day.
- 30. Sun.... *Nineteenth Sunday after Trinity.* Sir Isaac Brock, President, 1811.

TORONTO, SEPT. 15, 1883.

WE published the letter of a correspondent in our last issue, criticising the work of some of the reporters of the Courts. As to the two principal errors referred to in the Supreme Court reports, they do not seem at present to exist, for the volume as bound up gives the points as they should be. There has been a gradual and marked improvement in these reports, and we understand some changes in the division of labour between the reporter and the editor at Ottawa will materially help to guard against mistakes in the future. As to the errors noted in O.R. vol. 1, it must be remembered that it comprises the work of three different gentlemen, and care must be taken not to lay the guilt at the wrong door. But as to the expression, "defendant company" and "plaintiff company," Mr. Grant is right, following the form of expression used in some of the best text writers.

Whilst we agree with our correspondent that our reports should be as complete and perfect as possible, we know quite enough of the difficulties of the position as to be very lenient in any criticism. It is easier for a critic to find fault with others than to do the same thing as well himself. As

to the Ontario reporters (though we presume the Benchers give them as large salaries as they consistently can) their remuneration is not adequate to the labour and the sacrifice of time involved, for it must be remembered that, as a rule, a reporter's time is so cut into as to preclude him from engaging to advantage in the ordinary business of his profession. The almost inevitable result of a young barrister accepting this position, is that sooner or later he must elect either to throw it up, or else give up the chance of "making a business," and so become simply an official of the Law Society at a small fixed salary, with no chance of ever improving his position.

WE have before us (just received) No. 8 of O. P. R., containing apparently the reports of cases decided between 21st June, 1882, and 13th March, 1883. We are not disposed to be too critical of reporters' work, knowing the difficulties under which these useful officers labour. We may, however, be pardoned for suggesting that it would very much increase the value of practice reports if they were issued more promptly. We do not see why practice cases should occasionally remain unreported for so many months. If there are not a sufficient number of cases to make up one-twelfth of a volume we know of no immutable rule as to the size of a number which prevents the issue of a part containing only half the usual number of pages, giving the volume 24 parts instead of 12. Indeed, we think this should be the rule as to practice reports. We would also suggest that the Division in which the case is heard should be given, and that the judgments should, as far as practicable, and as used to be done some years ago, be printed in the order of date. There may be a good

ODDS AND ENDS.

reason why the judgment in *re Hall*, which was delivered on 4th September, 1882, should appear on page 373, while the judgment in *Bank of B. N. A. v. Eddy*, which was delivered on 11th July, 1882, appears on page 396, but it is not apparent. With respect to this matter, we understand there is a very proper rule of the Law Courts that cases are to be reported as soon as ready, without regard to the date of the judgments. Reasons may sometimes arise which delay the reports of special cases, as, for instance, difficulties in getting a sight of the briefs or papers, or the judge's note-book, or, perhaps, the original judgments may be wanted for use in the Master's office, and generally no evil results from judgments being reported out of the order of their date, if they are always prepared by the date of their delivery.

CURRENT CASES IN ONTARIO.

WHEN our note in our last issue, respecting the case of *Johnston v. Oliver*, was written we had not had the advantage of perusing the judgments delivered by the learned judges in that case. Since then the case, we are glad to see (although only disposed of on the 30th June, 1883), has already appeared in the authorised reports (2 O. R. 26). The point which we discussed in our note was thus dealt with by Mr. Justice Armour with his accustomed clearness. He says: "The only further question is, whether the widow being in possession of the land, and being entitled to dower in the land, she ought not to be held to have been in possession of one undivided third part of the land as dowress, the result of such a holding being that the title of the heirs at law to such one undivided third would not be extinguished. It seems anomalous that if the widow had been proceeded against by the heirs-at-law before their title was extinguished an account of the rents and profits of the land received by her, she would have been entitled to retain one-

third of the rents and profits as having been received by her *qua dowress*, and yet during all the time during which these rents and profits were accruing her possession of the land was ripening into a title under the Real Property Limitation Act, on the ground that she was in possession not as dowress, but as a wrong-doer." And he proceeds to say that to an action of ejectment by the heirs-at-law it would be no *defence* to the action that she was entitled to dower. It may be that the claim for dower is no defence to an action of ejectment by the heir, as is stated by the learned judge, but certainly none of the cases cited by him in support of the proposition can, we think, be considered very conclusive. None of them are directly in point; but in *Carrick v. Smith*, 34 U.C. R. 389, which was not referred to, we find Wilson, C. J., although expressing doubt as to the validity of the defence, nevertheless, did allow the defendant, who claimed as lessee of a dowress before assignment of dower, to set up her equitable title to possession as dowress as a defence in an action of ejectment brought against him by the heir. The case ultimately went against the defendant on the facts, so that there was really no decision on the merits of the defence (see 35 U. C. R. 348). So far as it goes, however, it affords support to the view that a widow in possession before assignment would be entitled under the system of pleading which has prevailed since The Administration of Justice Act to set up her right as dowress as a defence *pro tanto*; and certainly it is a defence which, we think, the Court should favour and endeavour to give effect on the ground of natural justice.

The learned judge seems to think the equitable rule which relieves a widow in possession before assignment of dower from accounting to the heir for more than two-thirds of the rents and profits, creates an anomaly, but it is fairly open to question whether the anomaly is not one of the learned judge's own creation; and whether, following out the equitable principle which is established with regard to rents and

CURRENT CASES IN ONTARIO.

profits to its legitimate conclusion, it does not lead to the perfectly consistent and equitable rule that when a widow is in actual possession of land, of which she is dowable before assignment, she must in equity be taken to be in possession of an undivided third as dowress, and therefore not only free from liability to account for one-third of the rents, but also unable to acquire any title by possession to that one-third of the land.

Some doubt may seem to arise as to whether since the reversal of *Harlock v. Ashberry* in the Court of Appeal, the decision of the Chancellor in *Slater v. Mosgrove*, 29 Gr. 392, which is to some extent based on that decision, is good law. We are disposed to think that it is altogether unaffected by the reversal of *Harlock v. Ashberry*. The question in *Harlock v. Ashberry*, 19 Ch. D. 539, was whether payment of rent by a tenant of part of the mortgaged land, was a payment binding the mortgagor as an acknowledgment of title as to the residue of the land, and the Court of Appeal reversing Fry, J., held that it was not, the judges in Appeal, basing their decision on the ground that a payment to prevent the running of the Statute of Limitations, must be made by some person liable to pay the principal or interest secured by the mortgage; and that the payment must be on account of one, or the other; that a tenant of the mortgagor was not liable to pay either principal or interest, and that the payment of rent was not a payment on account of either, although it might ultimately be liable to be brought into account between the mortgagor and mortgagee. This being the ground of the decision, we think it clear that it does not in the least affect the correctness of the learned Chancellor's conclusion in *Slater v. Mosgrove*. In that case the plaintiff claimed a vendor's lien, and the payment he relied on as taking the case out of the statute, was made by an endorser, on account of a promissory note given by the purchaser for the purchase

money. That was, therefore, the case both of a payment by some person liable to pay the principal and interest; and the payment in question was a payment on account of the purchase money.' The case, therefore, irrespective of *Harlock v. Ashberry*, is governed clearly by *Chinnery v. Evans*, 11 H.L.C. 115, to which the learned Chancellor also referred, and upon the proper application of which case the decision in *Harlock v. Ashberry* in appeal turned.

THE decision of the Chancellor in *O'Donohoe v. Whitty*, 9 P. R. 361, appears to be in direct conflict with the decision of the Supreme Court in *Joyce v. Hart*, 1 S. C. R. 321. The question to be decided in *O'Donohoe v. Whitty* was, what was the amount in controversy in the action. The action appears to have been one for redemption, in which the defendant claimed a bill of costs amounting to \$250. The bill was taxed at \$187.10, and plaintiff desired to appeal, claiming that he was not liable to pay even as much as taxed. The Chancellor held the amount in controversy was, as to the plaintiff, only \$187.10, and therefore no appeal could be had under the Judicature Act, s. 33, without leave. *Joyce v. Hart*, however, does not seem to have been mentioned to, or considered by, the learned Judge. In that case the plaintiff claimed by his declaration £500 damages and costs. He actually obtained judgment for only \$100, and the Supreme Court nevertheless held that the amount in controversy was the sum originally claimed by the plaintiff, and that the defendant was entitled to appeal. Mr. Justice Strong dissented from the majority of the Court, basing his opinion on the case of *Macfarlane v. Leclaire*, 15 Mo. P. C., upon the which the Chancellor also relied.

Master's Office.]

MUNSIE V. LINDSAY.

[Master's Office.]

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

MASTER'S OFFICE.

MUNSIE V. LINDSAY.

Improvements under mistake of title—Occupation rent—Tenants in common.

Improvements made under a mistake of title are not since R.S.O. c. 95, s. 4, allowed for as liberally as improvements made by a mortgagee in possession.

The enhanced value of a farm so improved is found by deducting from the present value of the land with the improvements, the estimated present value of the land without the improvements, *plus* any increase in value from other causes.

The occupation rent chargeable to a person improving land under a mistake of title should be the rental value of the land without the improvements.

A tenant in common occupying the joint property is not chargeable with the value of timber cut by him during his occupancy.

[Toronto, June 11.—Mr. HODGINS, Q.C.]

The facts sufficiently appear in the judgment taken in connection with the report of the case in 1 Ont. Rep. p. 164.

THE MASTER—The judgment allows to the defendant, Lindsay, the amount by which the lands and premises in the pleadings mentioned have been enhanced in value by lasting improvements made thereon by the defendant under the belief that the lands and premises were his own.

The lands were originally owned by one William Munsie, who died in 1854. By his will he devised the lands to his wife for life, and after her death to his son, Robert Munsie, who, it appears, was one of the attesting witnesses to the will. Robert Munsie conveyed the lands, in 1861, to his brother, James Munsie, who, in 1864, sold them to the defendant Lindsay. The tenant for life died in 1874. The judgment declares the devise to Robert Munsie invalid, and that as to the remainder in fee, after the life estate, the testator died intestate. The defendant Lindsay, by virtue of the conveyance referred to, is a tenant in common with those heirs of the late William Munsie, who are not affected by the conveyances; and the judgment partially recognizes his rights as such. Compensation for improvements does not necessarily depend upon their being made under a mistake of title. Thus a part owner who *bona fide* permanently benefits an estate by repairs or improvements, and a tenant for life completing permanently beneficial improvements to an estate

which had been begun by the testator, have been allowed a lien for their expenditures: *Snell's Equity*, p. 143.

The cases heretofore decided by the Court do not prescribe very clearly defined rules by which the enhancement of value of lands by reason of improvements made under a mistake of title should be arrived at.

The English cases appear to allow the full value of the improvements, as in the case of a mortgagee in possession: *Nelson v. Clarkson*, 2 Ha. 176; 4 Ha. 97. The American cases are much to the same effect: *Hilliard on Vend.* 48. And the earlier 'chancery cases in this country apparently follow the same principle. In *Bevis v. Boulton*, 7 Gr. 39; *Brunskill v. Clarke*, 9 Gr. 430; *Fitzgibbon v. Duggan*, 11 Gr. 188, the expenditure for improvements by which the estate had been substantially improved, was allowed. In *Smith v. Bonisteel*, 13 Gr. 29, 35, the decree directed an account of the improvements made by the defendant, and to what amount and in what proportion they had enhanced the value of the property. *Pegley v. Woods*, 14 Gr. 47 and *Morley v. Matthews*, *ib.* 551, show that the compensation allowed was based upon the enhanced value given to the land by the improvements. In *Carroll v. Robertson*, 15 Gr. 173, cases were referred to which showed that improvements made under a mistake of title had been allowed far more liberally than to a mortgagee in possession. A mortgagee in possession is usually allowed the sums expended by him in necessary repairs and lasting improvements with interest thereon: *Quarrell v. Beckford*, 14 Ves. 177, s. c. 1 Mad. 273; *Webb v. Roake*, 2 Sch. & Lef. 676; subject to certain restrictions: *Sanson v. Hooper*, 6 Beav. 246; *Jorton v. South-Eastern Ry. Co.* 2 Sm. & Giff. 48, 73.

Gummerson v. Banting, 18 Gr. 516, was decided prior to Mr. Bethune's Act, 36 Vict. 22. (R. S. O. c. 95, s. 4); and in that case *Spragge, C.*, following a decision of Mr. Justice Story in *Bright v. Boyd*, 1 Story's Rep. 478, 2 Story's Rep. 605, directed an account of the value of the improvements made, and how far the value of the land had been increased by such improvements. The statute now defines the lien for improvements made under a mistake of title to be "the amount by which the value of the lands is enhanced by such improvements;" so that the liberal rule referred to in *Carroll v. Robertson*, 15 Gr. 73, is no longer applicable,

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MUNSIE V. LINDSAY.

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and the person claiming such lien cannot now be dealt with as a mortgagee in possession. The cases of *Fawcett v. Burwell*, 27 Gr. 445 and *McGregor v. McGregor*, 27 Gr. 470 and on appeal (not reported), do not show how the enhanced value of the land should be investigated.

During the evidence in this case I stated that because the measure of relief in cases like the present was new, the parties had not apprehended the change in the law, and were directing their evidence more to the ordinary case of a mortgagee in possession than to that of a person claiming a lien, not for the actual cost of the improvements, but for the enhanced value given to the land by reason of his improvements; that I did not see how I could go into minute details or calculations based upon the cost of the separate materials used, the estimated cost of teaming such materials, the cost of construction, and the estimated value of the defendant's labor in making the various improvements claimed. I stated I should consider the case as it would be dealt with at Nisi Prius; and that in a case of this kind I thought a jury would be directed to find:—

1st.—Had the lasting improvements been made by the defendant under a mistake of title? And if they should so find then they might consider what, on the evidence, the improvements had cost the defendant, not so much with a view to their giving a verdict for the actual cost, but as an assistance to them in considering the other and further questions to be then considered, which would be:—

2nd.—What was the present value of the farm with the improvements made by the defendant?

3rd.—What was the value of the farm when the defendant purchased it, and what would the farm be worth now, if in the same state, without the defendant's improvements?

4th.—Had the farm, since the defendant's purchase, increased in value from other causes than the defendant's improvements, and if so to find such value?

That having ascertained the several values above enumerated, the jury might then be directed to find the enhanced value by deducting from the present value the unimproved value, and also the value from other causes than the improvements. And in arriving at such a conclusion that they might give some consideration to any opinion they had formed of the ac-

tual cost or value of the improvements, so that their verdict should not in any event exceed such actual cost or value.

Guided by these propositions I have considered the evidence, very conflicting in some instances, adduced by the parties. Ten witnesses place the present value of the farm, with the improvements, at \$7,000, while three place it at from \$6,000 to 6,500. The weight of evidence, therefore, is in favour of \$7,000. But the evidence as to the unimproved value of the farm is not so satisfactory. Three witnesses belonging to the Munsie family were examined on behalf of the plaintiffs, but their evidence impressed me with the idea that their family pride had been hurt by the sale of their old home, and that they held the farm, and quite naturally, at a higher value than others not so personally interested in it. I have not, therefore, given much weight to their evidence. Besides two of these three witnesses had not been on the farm for some time prior to Lindsay's taking possession in 1865. Two other witnesses for the plaintiffs stated that they had not been on the farm during the time Lindsay was in possession until they made their examination of it a few weeks previously with a view of giving evidence of values, and as to one of those witnesses I came to the conclusion which I noted during his examination, that I should not place much reliance on his evidence. The other of these two appeared to be a shrewd, hard man of business, who stated, in answer to a question, that his estimate of value was based upon what he would be willing to give if he were buying the property. Two other witnesses for the plaintiffs had that personal knowledge of the farm which showed they were competent to speak as to its original state, and they considered that the farm when the defendant purchased was worth \$4,500 and \$5,000, and that its value now would not differ from its value in 1864.

Against the opinion of these two witnesses, whom I considered competent to give evidence of the state and value of the farm, the defendant examined six witnesses, owners of adjoining farms, all of whom had personal knowledge of this farm prior to and during the defendant's occupation of it. The defendant was also examined on his own behalf, and proved that he gave \$4,400 for the farm; that he thought it was too much, but he got his own time to pay

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for it. He gave his evidence as if he was trying to state his case in a fair manner. Other witnesses stated that their opinion, at the time the purchase was made, was that the defendant had given too much for the farm, and on cross-examination they gave the names of several of their neighbours who expressed similar opinions at that time. Five witnesses swore that \$3,000 to \$3,500 was the value of the farm when the defendant purchased; one placed the value at \$3,700. The general effect of their evidence was that the farm at that time had been run down by reason of its having been badly farmed by tenants, and that as to its unimproved value it would not bring as much as it would in 1864, if now in the state it was then. These six witnesses placed the present value of the farm without the defendant's improvements, some at \$3,000 and others at \$3,500. They also swore that all the defendant's improvements had enhanced the value of the farm to the amount of \$3,500. The actual value or cost of the improvements was placed by the defendant at \$3,676.56.

In determining the compensation to which the defendant is entitled, I think I am bound to find, as one of the factors, what the present value of the farm would be without the defendant's improvements: (see Mr. Justice Story's decree in *Bright v. Boyd*, 2 Story's Rep. 605). The enhanced value can only be arrived at by a comparison of the present value of the farm as improved, with what its present value would be in the unimproved state. To take the value of the farm at the time of the purchase and compare it with the present improved value would obviously be unfair; for a farm may increase or decrease in value as years go on from various extrinsic causes, such as proximity to, or distance from, railroads, high or low prices of grain, nearness or remoteness from markets, general improvements in localities, speculation or other causes. In this case there was evidence that the farms in the township had increased in value since 1865, by reason of certain railroads. The evidence on this latter point was very general, and it is difficult to arrive at a fair estimate of such increased value. I think on the whole it will be more accurate, and therefore safer, to base such increased value upon actual calculations rather than the random guesses of witnesses. Several witnesses showed that the opening of the railroads in the locality had the

effect of reducing the cost of transporting grain to market by about two cents per bushel, and that the farms in the neighbourhood produced about 1,400 bushels a year. This would give a profit of about \$28 per year. From this should be deducted the annual railway tax, at present about \$10 a year, which would leave a net annual profit of \$18 representing the annual interest on a capital of \$300.

The case is eminently one for the consideration of a jury; and although juries are bound to give their verdict "according to the evidence," it is well known to both judges and the profession that their verdicts are sometimes compromises on the conflict of evidence, than findings according to the weight of evidence. It is not proper in a case of this kind to seek to effect a compromise between the divergent opinions of the two sets of witnesses examined on this reference. The decision should rest upon the question which of the two sets of opinions given in the evidence is correct. I have already expressed an opinion in respect of some of the plaintiff's witnesses, and intimated that only two of them could safely be relied upon in forming a just judgment on the facts affecting this case. Against their opinions are the opinions of six others equally competent and equally reliable. In this conflict of opinion it is proper that the weight of evidence should govern, and such weight of evidence is in favour of the values sworn to by the defendant's witnesses. Excluding the defendant's own testimony I find that five of the witnesses say that the defendant's improvements have increased the value of the farm by \$3,500, one that they have increased it by \$3,000 to \$3,500. But I prefer to find the value by the rules above referred to; and giving effect to the weight of evidence I find that the value of this farm, without the defendant's improvements, was \$3,500 in 1864, and that if in the same state it would be worth the same now, but with a further value caused by the railways, which I find to be \$300. These two values together make the present value of the farm, without the defendant's improvements, \$3,800. The present value with the defendant's improvements is \$7,000, and deducting from it the \$3,800, leaves \$3,200 as the amount by which the lands and premises, in the pleadings mentioned, have been enhanced in value by the lasting improvements made thereon by the defendant Lindsay

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under the belief that the lands and premises were his own.

The judgment charges the defendant Lindsay with a proper occupation rent since the death of the tenant for life in 1874. The defendant is one of the tenants in common of this property, and has occupied it for his own use and benefit. Ordinarily a tenant in common occupying the joint property, without excluding his co-tenants, is not liable to them for an occupation rent or for profits; but the Court has not applied that rule to this case. The statute, 4th Anne c. 16, s. 27, enables a tenant in common to bring an action of account against his co-tenant "for receiving more than comes to his just share or proportion." Prior to the statute there was no such right of action at common law: *Wheeler v. Home*, Willes 208; for says Co. Litt. 199 b., "one tenant in common taking the whole profits, the other hath no remedy in law against him, for the taking of the whole profits is no ejectment." The only remedy therefore is the action given by the statute: *Henderson v. Eason*, 2 Phil. 308; and such action will lie only for a share of the rents actually received by such tenant in common, and not for the profits or produce derived from his sole enjoyment of the joint property: *McMahon v. Burchell*, 2 Ha. 97, 5 Ha. 322, 2 Phil. 127; *Henderson v. Eason*, 15 Sim. 303, 2 Phil. 308, 12 Q. B. 986, 17 Q. B. 701; *Sturton v. Richardson*, 13 M. & W. 17; *Nash v. McKay*, 15 Gr. 247. And then not more than six years arrears of rent are recoverable: *Reade v. Reade*, 5 Ves. 749; *Drummond v. Duke of St. Albans*, *Ib.* 439; *Tarlton v. Goldthwaite*, 6 Ala. 346.

This occupation rent should be based upon the rental value of the farm in its unimproved state: *Morley v. Matthews*, 14 Gr. 551; *Carroll v. Robertson*, 15 Gr. 173; *Bright v. Boyd*, 2 Storey's Rep. 605; unless when interest is allowed on the expenditure for improvements: *Fawcett v. Burwell*, 27 Gr. 445; and it may be regulated by the amount of interest allowed to the defendant on the purchase money and on the value of his improvements, but should not exceed such allowance of interest: *Morton v. Ridgway*, 3 J. J. Marshall, 257; *Witherspoon v. McCalla*, 3 Dessaur 245. And this seems consistent with the rule that a vendor receiving interest on the purchase money is liable to the purchaser for the rents he has received: *Sugden, V. & P.* 493; see also *Stevenson v. Maxwell*, 2 Sandford Ch. 302.

On the rental value of the farm unimproved, the weight of evidence is with the defendant's witnesses, and though they vary in their estimate from \$100 to \$150, I think the latter sum is the fair value; and as the judgment determines the period of liability, I find that a proper occupation rent to charge the defendant since the death of the tenant for life in September, 1874, is the sum of \$150 per annum. The judgment allows the defendant his taxes paid on the property, and as a tenant in common I assume he will be entitled to a share of the \$150 rent with which he is chargeable.

The plaintiffs seek to charge the defendant for cutting and removing timber and other trees. The evidence shows that the defendant used the farm in a husbandlike manner, and that he considered the farm his own, and used only the fallen timber for fences and firewood. Besides, as a matter of law a tenant in common is not liable to his co-tenants for cutting timber on the joint property: *Martin v. Knollys*, 8 T. R. 146; *Rice v. George*, 20 Gr. 221. This portion of the plaintiff's claim cannot be allowed.

Brough, for plaintiffs.

Hoyles and Barwick, for defendant Lindsay.

SECOND DIVISION COURT, COUNTY OF ONTARIO.

STEWART V. BROCK.

Chattel mortgage—Re-filing.

A chattel mortgage was filed on the 19th September, 1881, at 2 o'clock p.m., and re-filed on the 19th September, 1882, at 11 o'clock a.m.

Held, too late.

[Whitby—Dartnell, J.J.]

Upon the facts above stated the following judgment was delivered by

DARTNELL, J.J.—As far as I know the point raised in this case has not been expressly decided

Armstrong v. Ausman, 11 U.C.R. 498, is the nearest in point, it being there held that where the first filing was on the 15th of May, a re-filing on the 14th of May following was clearly in time. In that case DRAPER, J., says, p. 503: "The year must commence generally on the day of filing, *i. e.*, at the commencement of that day, or on the hour of the particular day on which it is marked as received by the clerk."

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And BURNS, J., says, p. 509 : "The first filing was upon the 15th of May, consequently the year expired on the 14th May succeeding, at the latest moment of the day."

Mr. Barron, in his valuable work on Chattel Mortgages, at p. 191, expresses an opinion that a mortgage filed on the 1st January in one year, at 11:30 a.m., and re-filed on the 1st of January in the succeeding year, at 11:30 a.m., is re-filed in time, and cites *Armstrong v Ausman* as an authority.

With the greatest respect for the learned author, I think the proposition is a deduction hardly warranted by this and the other cases cited by him. The real question decided in *Armstrong v. Ausman*, was, whether the words of the Act excluded the twenty-four next before the actual hour and minute of the expiration of the year; or computing the day by its date, whether the day next before the day on which the expiration takes place is to be excluded. DRAPER, J., expressly says:—"I do not perceive any ground for so determining."

I think the learned judges in *Armstrong v. Ausman* expressly assumed that the day of the filing was not excluded. The words of the Act are "from the filing," not the "day of" or "date of" filing in which later cases it would be excluded.

Considering then that the year in the case before me expired, either at 2 p.m. on the 18th of September, 1882, or, at the best for the claimants contention, at the last minute before midnight between the 18th and 19th, I think a second year had been entered upon on the 19th, and any filing at any hour of that day, too late. I must therefore find for the execution creditor and bar the claimant's claim.

G. T. Smith, for the claimant.

J. A. McGilvray, for the execution creditor.

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Division Court practice—Warrant of committal—Amendment—Renewal—Endorsement of mileage.

Errors of dates and recitals in warrants of commitment can be amended by the judge under Rule 118.

The omission by the bailiff to endorse upon the warrant the number of miles, and the amount of mileage required to be done under Rule 103, will not vitiate the warrant.

The warrant was issued and dated on 2nd October, 1882, and renewed under Rule 102, by judge's order, dated 4th February, 1883.

Semble, properly renewed and in force.

(Whitby—DARTNELL, J.J.)

J. B. Dow, for the judgment debtor, who was in custody under a warrant of commitment under the Division Courts Act, moved for his discharge, both on the merits and on various objections to the warrant, all of which are set out in the judgment.

W. H. Billings, contra.

DARTNELL, J.J.—I am against the defendant on the merits, and therefore have only now to consider the technical objections to the warrant itself. There are three errors in dates or recitals, made by the clerk. These I think I have ample power to amend under Rule 118. In *Peck v. McDougall*, 27 U. C. R. 362, HAGARTY, J., says:—"We should hesitate before we hold that the omission of the clerk to enter an order of commitment in the procedure book destroyed the validity of the warrant, and made the party applying for it a trespasser." I think this language is applicable to other mistakes or errors made by the clerk. The officer executing the warrant endorsed in writing, under Rule 103, the actual day of the arrest, but omitted to give the number of miles, or amount of mileage, as required by the rule. I think this is merely directory, and for the purpose of the defendants being made aware of the total amount of debt and costs, should he seek his discharge under the provisions of section 186 of the Division Court Act. In case of payment under this section the bailiff or officer would simply lose his mileage through his own neglect. I do not see how his omission affects the validity of the warrant.

The remaining question has more force. The warrant was issued on 19th October, 1882. It is shown that the defendant, having become aware of its issue, left the Province and did not return until after the expiration of three months from its date. Application was then made for a renewal, and a judge's order therefor was made on the 4th February, 1883, and the defendant arrested. The affidavit upon which the order was based, satisfactorily showed the cause of the non-execution, and that the debt and costs had not been satisfied.

I think it is quite clear that under Rule 103

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the warrant ceases to be in force at the expiration of three calendar months from the date of the entry of the order for commitment, unless renewed by the judge. Mr. Dow contends that after that time the judge has no power to make an order for such renewal. Though not without doubt, I do not accede to this contention. The rule does not state, as in cases of writs of execution, that the renewal must be effected within the time limited. Notwithstanding the case of *Ex parte Dakins*, 16 C. 77, cited by Mr. Dow, I think the current of authority is against regarding these warrants as in the nature of writs of execution, but rather as process for contempt of court. The defendant, by evading service, has prevented execution of the warrant. He has not purged his contempt. I think I must over-rule all the objections, and discharge the summons.

UNITED STATES.

NEW YORK COURT OF APPEALS.

WOLHFAHRT V. BECKERT.

Negligence—Sale of poisons.

1. The sale by a druggist of a poisonous preparation without the word "poison" on the label, is not negligence when the purchaser is warned at the time of the sale of the dangerous nature of the medicine, and informed of the proper dose, notwithstanding the fact that the omission to place the word "poison" on the label constituted a misdemeanor.

2. But the sale of such a preparation without the word "poison" on the label, and without such warning is negligence both at common law and under the statute.

Appeal by defendant from an order of the General Term of the Supreme Court of the Second Department, granting a new trial and sustaining the exceptions of plaintiff taken at the trial. The jury had been directed to find a verdict for the defendant, and plaintiff's exceptions were ordered to be heard in the first instance at the General Term.

Plaintiff's intestate, being temporarily troubled with some bowel complaint, had been recommended by a peddler to take a small wine glassful of a comparatively harmless drug known as "Black Draught." The deceased, shortly after the peddler's recommendation, went to defend-

ant's drug store and obtained ten cents' worth of "Black Drops" in a small bottle, which simply had a label upon it with the words "Black Drops," but without the word "poison" and without any direction as to the dose. "Black Drops" is a deadly poison, being one of the strongest preparations of opium, ten or twelve drops constituting a dose.

At the trial the only witness who gave testimony as to the sale of the drug was the defendant's clerk, who testified that the deceased asked for ten cents' worth of "Black Drops;" that he was cautioned at the time that the drug was a poison, and that ten to twelve drops were a dose. Deceased immediately after the purchase of the medicine repaired to his home, where his wife in his presence poured out a little wine glassful of the "Black Drops," being the amount of the dose of "Black Draught" recommended by the peddler; the deceased took the dose poured out by the wife and died a few hours thereafter, despite the efforts of medical skill to save him.

The action was brought to recover \$5,000 damages for the negligence of defendant in the sale of the "Black Drops."

FINCH, J., delivered the opinion of the court:

Whether the case should have been submitted to the jury depends upon the inquiry whether the testimony of the defendant's clerk is to be taken as the truth of the transaction, or may be questioned or doubted. If he is to be believed, the druggist who sold the poison was guilty of no wrong or negligence toward the deceased, for he warned him that the "Black Drops" asked for was a strong poison, of which he should only take ten or twelve drops for a dose. Notwithstanding the warning he took probably ten times the prescribed quantity in reliance upon the previous statement of the peddler, Silberstein, that he had taken half a glass of what he called "Black Draught" and it had cured him. On such a state of facts a verdict against the defendant would not be justified. Although no label marked "poison" was put upon the phial, and granting that by such omission the defendant was guilty of misdemeanor and liable to the penalty of the criminal law, still that fact does not make him answerable to the customer injured, or to his representative in case of his death, for either a negligent or wrongful act, when toward that customer he was guilty of neither, since he fairly and fully warned him of all and more than

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could have been made known by the authorized label. The statute requires the ringing of the bell or sounding of the whistle by an engine approaching a railroad crossing, but one who sees the train coming has all the notice and warning which these signals could give, and though they are omitted takes the risk of the danger which he sees and knows if he attempts to cross in front of the train. *Pakalinski v. N. Y. etc. R. Co.*, 82 N. Y. 424; *Connelly v. N. C. etc. R. Co.*, 88 N. Y. 246. So here if the warning was in truth given, if the deceased was cautioned that the medicine sold was a strong poison, and but ten or twelve drops must be taken, he had all the knowledge and all the warning that the label could have given, and could not disregard it, and then charge the consequences of his own negligent and reckless act upon the seller of the poison. But if no such warning was in fact given, its omission was negligence, for the results of which the vendor was liable both at common law and by force of the statute. *Thomas v. Winchester*, 6 N. Y. 409; *Loop v. Litchfield*, 42 N. Y. 358; *Wellington v. Downer Ker. Oil Co.*, 104 Mass. 64; 3 R. S., p. 4, ch. 1, title 6, sec. 25. By the statute it is made a misdemeanor for any person to sell "any arsenic, corrosive sublimate, prussic acid, or any other substance or liquid usually denominated poisonous without having the word 'poison' written or printed upon a label attached to the phial, box or parcel in which the same is so sold." The liquid sold to the deceased was in fact a poison, and death resulted from taking a trifle less than the quantity sold. The evidence showed that the "Black Drops" in both forms of preparation was "deadly," and that it was usually denominated poisonous is to be inferred both from its well known character and from the evidence given by the pharmacist, who said that unless selling upon the prescription of a physician he would mark upon the medicine the dose, or label it poison, or do both. Indeed, the learned counsel of the defendant concedes all this, for he says "if any third party, unacquainted with the real contents of the phial, had been injured, then an action would lie against the defendant," and the defence interposed rests wholly upon the fact asserted that full warning of the poisonous nature of the liquid was given, and the quantity which might be safely taken was stated to the purchaser. So that the question here whether the non-suit ordered by the

trial judge can be sustained or not turns solely upon the inquiry whether the warning was in fact given, and that again upon the question whether the jury would have been at liberty to disbelieve the evidence of the defendant's clerk. His story in itself was not improbable, so far as the defendant's actions are concerned. A druggist selling for ten cents a medicine which was a poison, and in a quantity capable of killing an incautious or ignorant purchaser would be quite likely, we should suppose, to give the brief information needed to protect his customer and shield himself from grave danger and disaster. Nor was the witness impeached by what are called the contradictions in his testimony drawn out on cross examination. They were very slight and utterly immaterial. But two facts disclosed by the proofs opened his testimony to doubt and, possibly, disbelief. He was an interested witness. He had violated the law by omitting the label required. The medicine he delivered had killed its victim. The consequences of the act upon himself, upon his future, and upon his employer were certain to be disastrous in the absence of explanation or justification. The motive to avert the danger even by falsehood was plain and powerful. The label was not on the phial. No such defence was possible. The only other one was to swear to the verbal warning given to the customer. The witness, therefore, stood in a position such as to provoke suspicion, arouse doubt, and justify watchful and rigid criticism. And then joined to that came the facts of the conduct of the deceased. If the evidence was true, he took the poison in a deadly dose, and from the hands of his wife with knowledge that it was a poison, and that he was largely exceeding the prescribed quantity. Nothing in the case permits us to imagine that he did so purposely and intended suicide. What can be said, and all that can be said, is that he relied upon the peddler's story of his experience in taking without injury one-half of a glass, rather than upon the druggist's warning that the medicine was a strong poison. That is possible, but has about it some doubtful elements. A man even of ordinary intelligence and very moderate prudence, who had been told by a friend that he had been cured by a particular medicine taken in the quantity of half a glass and thereupon went to a druggist, who was also a doctor, to purchase it, and was then distinctly told that the medicine

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was a poison, and but ten or twelve drops must be taken, would naturally be somewhat startled. We should expect him to speak and manifest surprise, or at least seek the truth out of the contradictions. But this customer manifested none. He showed no curiosity. He asked no natural question. He did not say that a friend had taken ten times the doctor's dose with safety, and ask who was right or who was wrong, or if there was not somewhere a mistake as to the medicine. On the contrary, with the warning ringing in his ears, he quietly receives the medicine without surprise, allows his wife to pour nearly the whole contents into a spoon and says not a word to her of the information he had received; does not tell her what the doctor said; does not heed his warning; relies upon the advice of an unskilled peddler, discarding that of the druggist and physician, and takes the fatal dose. It cannot be denied that this conduct matches naturally and exactly the line of action we should expect if no warning had been given, and does not appear so perfectly natural when confronted with the opposite theory. It tends, therefore, to throw doubt upon it, and to make one hesitate as to the truth, and when combined with the palpable interest of the clerk to shield himself and his employer makes a case in which there is a possibility of different and debatable inference from the evidence given, and so develops a question of fact rather than of law. In *Elwood v. Western Union Tel. Co.*, 45 N. Y. 553, it was said that the rule that where unimportant witnesses testify positively to a fact and are uncontradicted, their testimony must be credited, is subject to many qualifications, and among them this, that the interest of the witness may affect his credibility, and it was added, upon the facts of that case: "Such evidence as there is proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibilities for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive." To a similar effect are other cases. *Kavanagh v. Wilson*, 70 N. Y. 177; *Gildersleeve v. Landon*, 73 N. Y. 609. The General Term were, therefore, right in saying that the case should have been submitted to the jury.

The judgment should be affirmed and judgment absolute rendered in favour of the plaintiff upon the stipulation, with costs.

Wm. C. De Witt, for appellant.

Samuel Greenbaum, for respondent.

—*Central L. J.*, July 20.

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PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[June 29.

DRISCOLL V. GREEN.

Chattel mortgage—Affidavit of debt.

In November, 1881, a chattel mortgage was made to secure the plaintiff as indorser of a promissory note of the mortgagor, dated 4th October, 1881, at two months. A recital in the instrument stated that it had been given "as security to the mortgagee against his endorsement of said note, or any renewal thereof that shall not extend beyond one year from the date thereof; and against any loss that may be sustained by him by reason of such endorsement of said note, or any renewal thereof." The affidavit stated it was made "for the express purpose of securing the mortgagee against the payment of such his liability for the said mortgagor by reason of the promissory note therein recited, or any future note or notes which he may endorse for the accommodation of the mortgagor, whether as renewals of the said note or otherwise."

Held, reversing the judgment of the Court below, that as the mortgage itself was good, and the affidavit covered all that is required by the Act, that part of the affidavit from "or any future note" to the end was unnecessary, as far as creditors were concerned, and could not vitiate the security.

H. J. Scott, for appeal.

Gibbons, contra.

LOWSON V. CANADA INSURANCE CO.

Immediate execution—Practice.

Held, reversing the decision reported 9 P.R. 185, that R.S.O. ch. 161, sec. 61, as to Mutual Insurance Companies, providing that no execu-

tion shall issue against such a company upon any judgment until after the expiration of three months from the recovery thereof, does not apply to a judgment recovered on a policy issued by the company on the cash principle.

Lount v. Canada Farmers' Mutual Insurance Co., 8 P.R., 433, over-ruled.

The proper way of enforcing the judgment of the Court of Appeal is to have the judgment of the Court below amended if necessary according to the judgment in Appeal, and when amended to issue process thereon.

Cattanach, for appeal.

BANK OF OTTAWA v. MCLOUGHLIN.

Increased jurisdiction of Division Courts—Balance of claim—Judicature Act.

Where the original demand is ascertained by the signature of the party liable, and a balance not exceeding \$200 remains due, the Division Courts under the Act of 1880 have jurisdiction.

The Judicature Act and rules in relation to procedure do not apply to the Division Courts; and Rule 330 of the Supreme Court of Judicature applies only to the Courts to which in terms it is made applicable.

At the trial the plaintiff elected to take a non-suit and the judge refused a new trial.

Held, that plaintiff was entitled to move to set aside the non-suit, and if refused could appeal therefrom.

Held, also, that a promissory note could be stamped by the maker on the day of the making thereof, though after it had been signed and endorsed. (See *ante* p. 238).

RE MCDUGALL.

Insolvent Act—Interest on claims.

After payment by the insolvent's estate of 100 cents in the dollar the creditors claimed interest on their claims out of a surplus in the hands of the assignee.

Held, reversing the decision of the Court below, that notwithstanding the provisions of sec. 99 of the Insolvent Act, interest was payable on all debts originally payable with interest by contract or otherwise, but not where it was claimable by law as damages only.

Gormully, for appeal.

Bethune, Q.C., contra

FLEMING v. McNAB.

Land tax—Sale for taxes—Invalid sale by reason of improper assessment—Principal and agent—Agent buying.

The assessment of land in the name of the plaintiff embraced seven acres already sold and separately assessed, of which fact the assessor was aware. The defendant purchased at a sale for taxes, and the plaintiff instituted proceedings impeaching the sale within two years thereafter.

Held, affirming the judgment of the Court below, that the assessment was illegal and vitiated the sale.

The defendant had for some years acted as agent of the plaintiff in attending to the payment of the taxes on these lands, but for some time before the sale the plaintiff procured the services of one H. in this behalf. H. employed the defendant to pay the taxes to the Treasurer, which he did. The land was placed in the hands of a land agent to sell when the defendant offered to procure a purchaser on being paid a commission by the plaintiff, and nothing further occurred to destroy the relative position of the parties until the sale for taxes.

Per BURTON, J.A.—The confidential relationship was determined by the employment of H. by the plaintiff to pay the taxes.

Per PROUDFOOT, J.—That what took place could not have the effect of determining the relationship between them, and therefore the defendant could not purchase the plaintiff's land to his prejudice.

C. Robinson, Q.C., and *O'Connor*, for appeal.

S. H. Blake, Q.C., and *Hall*, contra.

POWELL v. PECK.

Sale of patent—Renewal of patent.

The judgment of the Court below (reported 26 Gr. 322) reversed—Patterson, J.A., diss., the Court holding that from Peck's evidence before, as also after the expiry of the original patent he was aware when purchasing from Powell the patent he was obtaining the same for the unexpired term only, and that Powell did not lead Peck to understand or believe that the then existing patent had ten years to run.

Powell assigned all his right and interest in the patent to hold the same to the full end of the term for which the same had been issued as fully

as the same would have been held and enjoyed by him had such sale not taken place.

Held, per PATTERSON, J.A., that this did not restrict the assignment to the unexpired term of the original patent, but that Peck was entitled to a renewal thereof under the statute.

Per OSLER, J.—The right of Peck was restricted to the then existing patent.

Moss, Q.C., and *Black*, for appeal.

Blake, Q.C., and *Fitzgerald*, contra.

RUSSELL V. CANADA LIFE ASSURANCE CO.

Life insurance—Statements of insured—Independent inquiries by Co.

The managing officer of an Insurance Co. directed the local agent to make inquiries as to the habits and state of health of A. R., the answers made by him to the usual questions of the Company not being considered reliable, and on the agent giving a satisfactory report in reference thereto the application for insurance was accepted and a policy issued.

Held, that the Company was not thereby precluded from shewing that the application and answers of A. R. contained such wilfully untrue representations as rendered the policy void.

Bethune, Q.C., and *McTavish*, for appeal.

McCarthy, Q.C., and *A. Bruce*, contra.

ROSENBERGER V. GRAND TRUNK RAILWAY CO.

Railway Crossing—Giving warning of approach of train.

The decision of the C. P. D. reported 31 C. P. 349, affirmed, Burton, J.A., dissenting.

DIRECT CABLE CO. v. DOMINION TELEGRAPH CO.

The decision of the Court below (28 Gr. 648) affirmed.

MACNAMARA V. McLAY.

Registrar of deeds—Fees on searches, &c.—Public inspecting books.

In an action brought against a County Registrar to recover back alleged over-charges, it was shewn that the plaintiff had called upon the Registrar to search the books and indices in his office, and informed him of the persons named

as grantees in the last executed deed of a certain lot; and also what encumbrances there were registered against it. There were 28 entries on the abstract index, and the Registrar charged for these services at the rate of 25c. for the first four entries, and 5c. for each of the other entries.

Held, that this charge was proper.

The plaintiff told the Registrar that one A. owned a lot in the Township of B., but was ignorant as to the number of the lot, and asked the Registrar to tell him what encumbrances there were against it, which the Registrar did, and charged for those services 25c. for ascertaining the number of the lot, and 25c. for searching for the encumbrances.

Held, that both were proper charges.

The plaintiff asked to examine an original conveyance in the Registry Office, informing the officer of the names of parties thereto and the lands affected thereby, but did not tell him the number of the conveyance. The Registrar examined the index, for which he charged 25c., and 10c. for producing the document.

Held, also, to be proper charges.

The Registrar was required to produce the abstract index of a lot which contained 180 entries, for which he required to be paid \$2.00 as for a general search, the plaintiff offering to pay 25c.

Held (BURTON, J.A., dissenting), that the Registrar charged \$1.75 too much.

The Registrar charged \$2.05 for an abstract of five folios—i.e., \$1.20 for searches, the remainder being for copying at the usual rate.

Held, the Registrar was entitled to those fees, though he only copied it from the index.

A Registrar when preparing an abstract is not bound to rely on the correctness of the abstract index, but may properly test its correctness by making all searches necessary for the preparation of the abstract; he may rely, however, on the index if he thinks proper and charge the same fees as for searches. But if he gives a certified copy of the abstract index only he can charge no more than the rate per folio.

Per BURTON, J.A.—The Registrar is the proper person to make searches, and he must produce the original instruments and the books containing copies thereof only, but not the abstract index.

Per PATTERSON, J.A.—Every person interested in a lot of land is entitled to see the abstract in-

dex thereof for the purpose of making a search, as the book containing such abstract is one of those which the Registrar is bound to exhibit under the Registry Act.

McLay, in person.

Clement, contra.

MARTIN V. MCALPINE.

Cognovit—Collusion—Remedy against creditor.

The plaintiff was suing one F., an insolvent, when the defendant, also a creditor, applied to him in order to induce him to execute a confession of judgment, the defendant promising to give him time, whereupon F. signed the confession, by which the defendant obtained priority over the plaintiff, and both parties placed writs of execution in the hands of the sheriff, who sold under the defendant's writ, the defendant becoming the purchaser of part of the goods, the price of which he retained and received the balance from the sheriff.

Held, reversing the judgment of the Court below, that the confession was void under R.S.O. ch. 118, sec. 1, and that the price for which the goods were sold was properly applicable to the plaintiff's writ. An order was accordingly made directing the defendant to pay the amount to the plaintiff.

Moss, Q.C., and Martin, for appeal.

S. H. Blake, contra.

CHANCERY DIVISION.

Full Court.]

[Sept. 7.]

GILROY V. McMULLAN.

Lease—Parol agreement.

The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the indenture of lease.

At the hearing the defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber.

Held, (affirming FERGUSON, J.,) the evidence of the parol bargain could not be admitted.

Mason v. Scott, 22 Gr. 592 followed.

B. B. Osler, Q.C., for the defendant.

S. H. Blake, Q.C., for the plaintiff.

PRACTICE CASES.

Cameron, J.]

[Aug. 28.]

Writ of attachment—Debt not due—What may be considered an application to set aside.

Motion to set aside a writ of attachment against an absconding debtor. Goods were sold to the defendant upon a five months credit. The defendant refused to accept a bill of exchange for the price of the goods at five months, and the plaintiff issued a writ of attachment before the expiration of the five months.

Held, that there was no debt due at the time when the writ issued.

Held, that the existence of a debt sworn to may be questioned on such an application as the present.

Writ of attachment set aside.

Aylesworth, for the defendant.

J. H. Macdonald, for the plaintiff.

CORRESPONDENCE.

To the Editor of the LAW JOURNAL.

SIR,—At the close of this year the Inc. Council of Law Reporting for England issued a triennial digest for the three years subsequent to the digest last issued by them.

Could not our Law Society give us at the end of this year a digest of the cases reported since Robinson and Joseph's digest and down to the end of 1883, and then follow the English plan of issuing a digest every three years. It would be a great boon to the profession.

Yours, &c.,

BARRISTER.

[The Law Society have instructed Mr. Robinson, the editor of the reports, to prepare a triennial digest, which will be issued by the beginning of January, just three years since the publication of Robinson and Joseph's digest. It will be presented to the profession with the reports. Mr. Robinson has secured the valuable services of Mr. Joseph in the preparation of the digest.—EDS. L. J.]

LAW STUDENTS' DEPARTMENT.

LAW STUDENTS' DEPARTMENT.**EXAMINATION QUESTIONS.****SECOND INTERMEDIATE.—HONORS.***Real Property.*

1. What methods are there of mortgaging leasehold property? Which is the most advantageous to the mortgagee? Explain.
2. Can a married woman make a valid devise of lands?
3. What was the question at issue, and what was the decision in *Doe dem Anderson v. Todd*?
4. What is a rack-rent?
5. Can a testator bar his widow's dower in any manner by his will? Explain fully.
6. What are the provisions of the Ontario Statute as to actions by and against the representatives of a deceased person for injury done to real estate?
7. It is sometimes said that the Statute of Frauds was not intended to apply to deeds, and therefore that signing is not necessary for a deed. Is there any special reason for or against signing in Ontario?

CERTIFICATE OF FITNESS.*Mercantile Law and Statutes.*

1. Discuss briefly the circumstances *necessary* to constitute a partnership between two or more individuals, with special reference to any statutory enactments on the subject.
2. A promissory note made by A to the order of and endorsed by B, promising to pay \$500 on 24th May inst., is dishonored. State accurately the *necessary* steps to be taken in order to bind B, distinguishing the same from expedient steps, giving grounds for your answer, and with special reference to any statute law involved.
3. State in general terms the steps necessary to be taken to secure a loan of \$500 by mortgage upon one of our lake steamers, with reasons for the steps so to be taken.
4. Define Bottomry, Respondentia, Charter party, and Bill of Lading.
5. Point out any difference in principle between the contracts of Fire and Life Assurance, and mention any restriction placed on the condi-

tions of a Fire Policy, and the means provided for enforcing such conditions.

6. A merchant is indebted to several persons and secures one of them by chattel mortgage on his whole stock-in-trade, representing his total assets. To what extent would this mortgage, supposing it formally correct, be valid, and why?

7. What effect will the negotiation of a Bill of Lading have on the right of Stoppage *in transitu*? Give reasons for your answer.

8. Give any statutory requisites of the sufficiency of a contract of sale of goods over \$40 in value, referring as nearly as you can to the Statutes relating to the same.

9. Give a brief sketch of the practice in obtaining judgment under Rule 80 of the Judicature Act.

10. To what extent is misdirection on a point of law or improper rejection of evidence by the judge presiding at the trial of an action ground for a new trial? How was it at Common Law, and how has the change, if any, been brought about?

CALL TO THE BAR.*Real Property and Wills.*

1. What are the rules to be observed as to the commencement of the abstract of title to land? Explain fully.
2. Where there is no stipulation in the contract of sale, is it the duty of the vendor, or of the purchaser, to prepare and get executed the conveyance? At whose expense is it prepared, and at whose expense is execution procured?
3. What is the effect of the recitals upon the operative part of a conveyance?
4. What is the effect of a statutory discharge of a mortgage in fee simple made by a tenant in tail?
5. What becomes of property directed by a testator to be converted, which remains undisposed of by the will? Explain.
6. What are the rules of construction of devises, and bequests upon conditions?
7. Is it necessary to the valid execution of a will under the Wills Act of Ontario that the testator should actually see the witnesses thereto write their names upon the will as witnesses. Give your reasons.
8. A presents a mortgage of lot No. 1 to the Registrar for registration. The latter receives

LAW STUDENTS' DEPARTMENT.

and numbers it, enters it on his books and endorses a certificate of registration thereon, but by mistake he enters it on the *abstract index* under lot No. 2. By a subsequent search of lot No. 1 B ascertains that it is to *all appearances* unincumbered, and having no knowledge of A's mortgage, advances money upon mortgage of lot No. 1, and duly registers his mortgage which is correctly entered on the abstract index under lot No. 1. Which mortgage takes priority? Why?

9. Land is vested in A in fee simple in trust for B and his heirs. A dies intestate leaving two daughters and a son. B. dies intestate immediately afterwards leaving two sons, and a son of a deceased daughter. Trace the descent of both the legal and the equitable estates.

10. Explain the doctrine that a use could not be raised without a consideration.

Criminal Law and Torts.

1. Define accessory *before* the fact. What is the extent of his criminal responsibility.

2. A, a servant of B, received certain money on account of his master, which he entered in his master's books, charging himself, however, with it, but did not pay it over, claiming a right to it. Discuss the offence, if any.

3. What is the rule as to the responsibility of a carrier for negligence where the party injured has been himself guilty of negligence?

4. What constructive breaking is sufficient to establish the crime of burglary?

5. State accurately any statutory changes made in Canada which have invaded the rule laid down in criminal cases that the defendant is not a competent witness.

6. State briefly what the prosecution have to prove under an indictment for robbery in order to secure a conviction?

7. What is the effect of an acquittal of a prisoner upon technical grounds, as, for instance, defect in proceedings? What if acquitted on grounds of insanity?

8. Under our Statutes how far is an Executor liable for the tort of his testator? Explain fully.

9. Discuss the general rule, and illustrate it briefly, that privity is not requisite to support an action *ex delicto*.

10. What legal duties are cast upon a parent with reference to his legitimate children? What as to his or her illegitimate children?

CALL—HONORS.

Equity Jurisprudence.

1. Permanently beneficial improvements are made to real estate (1) by a part owner; (2) by a tenant for life, and (3) by a person under a mistake of title. What relief are each of the above parties entitled to in respect of such improvements?

2. Define legal and equitable assets; and classify the latter which are equitable assets (1) by their own nature; and (2) by the act of the testator.

3. Explain the jurisdiction of equity in cancelling and delivery up of documents; and show the grounds upon which that relief is exercised in the case of (1) voidable, and (2) void, instruments.

4. Define Constructive Fraud, Constructive Trusts, Constructive Notice, and give illustrations of each.

5. Give illustrations of cases of election, (1) under powers, (2) where a testator affects to dispose of his own property, by an ineffectual instrument, and (3) show whether evidence *dehors* the instrument is admissible.

6. State proceedings necessary to be taken under the Quietting Titles Act, to obtain a Certificate of Title and the effect of such Certificate under the Act.

7. Explain what is meant by (1) the exclusive and (2) the concurrent, jurisdiction of equity respecting legacies, and classify the various classes of legacies.

8. State the practice under the Judicature Act in moving against the verdict (1) of a Judge without a jury, and (2) of a jury.

9. By what legislative authority may the present Parliamentary constitutions (1) of the Dominion of Canada, and (2) of the several Provinces of the Dominion, be amended or changed.

10. What is the legislative authority of the Dominion Parliament, and of the Provincial Legislatures, respecting the (1) punishment of crimes, and (2) enforcing the provisions of their statutes?

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS—LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

- Practice in cases of foreign extradition.—*American Law Rev.*, May—June.
- Fraudulent mortgages of Merchandise.—*Ib.*
- Trial by jury.—*Ib.*
- Actions on judgments.—*Ib.*
- Implied warranty of fitness of a chattel.—*Ib.*
- Titles of statutes.—*Ib.*, July—August.
- American law governing the payment of debts of deceased persons.—*Ib.*
- Functions of a prosecuting officer.—*Ib.*
- The married woman's property Act, 1882, (England).—*Ib.*
- Judicial discretion.—*Ib.*
- Once in jeopardy.—*Crim. Law Rev.*, July.
- Survival of actions.—*Am. Law Register*, June.
- Specific enforcement of contracts to transfer stock.—*Ib.*, August.
- Costs on the recovery of a balance.—*London L. J.*, May 12.
- Injunctions under the Judicature Act.—*Ib.*, June 9.
- Insurance between contract and completion.—*Ib.*, June 23.
- Discovery under the Judicature Act.—*Ib.*
- The same under the new rules.—*Ib.*, July 28.
- Counter-claims without claims.—*Ib.*, June 30.
- Distress damage feasant.—*Ib.*, July 7.
- The new rules of procedure.—*Ib.*, 14, 21, 28.
- Commissions of real estate agents.—*Central L. J.*, June 8.
- Termination of the liability of a common carrier.—*Ib.*
- Lawyer and client—Contingent compensation.—*Ib.*, June 15.
- Donatio mortis causa.—*Ib.* June 22.
- Married women's debts.—*Ib.*, July 6.
- Mistake of a legal right.—*Ib.*, July 13.
- Surface water on agricultural lands.—*Ib.*, July 20, 27.
- Conveyance of expectancy—Release.—*Ib.*, July 27.

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

MECHANICS' LIENS :—

A treatise on the Law of Mechanic's Liens on Real and Personal Property. By Samuel L. Phillips, Washington, D. C. Second edition. Little, Brown & Co., Boston.

VENDORS AND PURCHASERS :—

A treatise on the Law and practice relating to Vendors and Purchasers of real estate. By J. H. Dart. Fifth edition. Stevens & Sons.

CASES ON THE B. N. ACT :—

Cases decided on the British North America Act, 1867, in the Privy Council, the Supreme Court of Canada, and the Provincial Courts. Collected and edited by Jno. R. Cartwright, Queen's Printer.

MINING REPORTS :—

A series containing the cases on the law of mines found in the American and English Reports, arranged alphabetically by subjects, with notes and references. By R. S. Morrison, of the Colorado Bar. Vol. i. Callaghan & Co., Chicago.

CARRIERS :—

With special reference to such as seek to limit their liability at Common Law by means of bills of lading, express receipts, railroad tickets, baggage checks, etc., etc. By J. D. Lawson W. H. Stevenson, St. Louis.

REAL PROPERTY :—

Principles of the Law of Real Property; intended as a first book for the use of students in conveyancing. By the late Josh. Williams. Fourteenth edition. By his son, T. C. Williams. H. Sweet.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for August 18th and 25th contain, The Real Lord Byron, *Quarterly*; Half a Century of Literary Life, *London Quarterly*; John Richard Green, by EDWARD A. FREEMAN, *British Quarterly*; Classic Conceptions of Heaven and Hell, *Westminster*; Cave Tombs in Galilee, *Fortnightly*; Terry Wigan, *Blackwood*; The North Farm: Now, by J. E. PANTON, *Tinsley*; Voltaire in England, *Cornhill*; The Empress Eugenie's Flight to England, *Temple Bar*; Grace Darling, *Leisure Hour*; Sea Island Cotton, *Chambers' Journal*; Benvenuto Cellini, *All the Year Round*; with instalments of "Uncle George's Will," and "Along the Silver Streak," and Poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both post-paid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1883.

The following gentlemen were called to the Bar during this term, namely:—

C. L. Mahony, with honors; P. D. Crerar, with honors. (Mr. Mahony was awarded a gold medal and Mr. Crerar a silver medal.) Messrs. R. W. Leeming, C. G. O'Brian, M. MacKenzie, C. W. Plaxton, Ed. Poole, M. A. McLean, G. F. Ruttan, A. Foy, G. T. Ware, A. J. Williams, R. W. Armstrong, J. D. Gansby, A. D. Kean, D. Lennox, L. C. Smith, A. E. W. Peterson, W. H. Brouse, F. E. Curtis, A. O. Beardmore, H. C. Hamilton, C. R. Irvine and J. F. Canniff.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

Graduates—R. F. Sutherland, A. M. Ferguson, W. Hunter, C. D. Hossack, E. A. Holman, E. J. Bristol.

Matriculants—S. W. Burns, R. A. Grant, F. H. Kilbourne, A. J. Forward and H. J. Snelgrove.

Junior Class—A. M. Grier, H. D. Cowan, G. H. Douglas, W. E. Hastings, A. D. Scatterd, M. H. Burtch, J. B. Davidson, R. H. Hall, W. Lawson, W. C. P. McGovern, F. E. Walker, C. Horgan, R. R. Ross, C. A. Ghent, H. N. Rose, J. R. Code, F. W. Carey, D. Sinclair, W. Stafford, J. Fraser, W. Geary, H. M. Cleland, S. R. Wright, A. McNish, G. M. Brodie.

Mr. Donald Ross was allowed his examination as an Articled Clerk.

Trinity Term having been postponed until Monday, the 3rd September, the examinations will take place as follows:—

Primary—Junior Class, Tuesday, 14th August; Graduates and Matriculants, Thursday, 16th August.

First Intermediate—Tuesday, August 21st.

Second Intermediate—Thursday, August 23rd.

Solicitor—Tuesday, August 28th.

Call—Wednesday, August 29th.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From 1883 to 1885.	Arithmetic.
	Euclid, Bb. I., II., and III.
	English Grammar and Composition.
	English History Queen Anne to George III.
	Modern Geography, N. America and Europe.
	Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cæsar, Bellum Britannicum.
	Cicero, Pro Archia.
1884.	Virgil, Æneid, B. V., vv. 1-361.
	Ovid, Heroides, Epistles, V. XIII.
	Cicero, Cato Major.
	Virgil, Æneid, B. V., vv. 1-361.
1885.	Ovid, Fasti, B. I., vv. 1-300.
	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. IV.
	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

Canada Law Journal.

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OCTOBER 15, 1883.

No. 16.

DIARY FOR OCTOBER.

1. Mon. ... Co. Ct. Term (ex. York) begins. Co. Ct. sitt. without jury (ex. York) begin.
3. Wed. ... First edition English Bible printed, 1535.
6. Sat. ... County Court Term (except York) ends.
7. Sun. ... *Twentieth Sunday after Trinity.*
8. Mon. ... County Ct. Term for York begins. Harrison, C.J. sworn in, 1875.
11. Thurs. ... Guy Carleton, Governor of Canada, 1774.
12. Fri. ... Lord Lyndhurst died, 1863.
13. Sat. ... Co. Ct. Term for York ends. Battle of Queens-ton, 1812.
14. Sun. ... *Twenty-first Sunday after Trinity.*

TORONTO, OCT. 1, 1883.

REFERRING again to the subject of the practice reports, alluded to in our last number, it is only fair to state that the reporter has given with much promptitude early notes of the points decided, which have been immediately published in this journal; so that, although there has sometimes been a delay in the issue of the reports, the profession have not been kept in ignorance of the points decided. The whole subject of the reports has been receiving much attention at the hands of the Reporting Committee, who are making every effort to place them on a satisfactory footing.

As we go to press we notice the retirement from the Bench of His Honor James Robert Gowan, County Judge of the County of Simcoe, and Chairman of the Board of County Judges. Those only, and the circle of these is no limited one, who know of his learning, his large and ripened experience, and his great services to the country in numberless ways, can measure the loss this will be to the Bench of which he was *facile princeps*. We shall endeavour in our next issue to give a short sketch of his judicial career. In the

meantime, we would express the hope that many years may be given him to enjoy the rest he has won by a lifetime of hard work and devotion to the onerous duties of his position. He is succeeded by the Junior Judge of the County, His Honor Judge Ardagh, whom we congratulate on his promotion. It would have been difficult to find one more worthy to succeed his eminent predecessor. William Boys, Esq., of Barrie, takes the place vacated by Judge Ardagh.

DIVISION COURT STATISTICS.

We have received the annual report of the Inspector of Division Courts for 1881. It contains a number of interesting tabular statements. The Inspector has judiciously, we think, given the total figures for the preceding year 1880, under the totals for the year 1881, so that a very interesting comparison of the volume of business for the two years is readily made.

There has been a very marked decrease of business in the outer rural counties. In 1880 the number of suits of all kinds (including judgment summonses and transcripts) entered in all the Division Courts of the province was 85,156, while in 1881 the total number was only 59,792, showing a decrease of 25,364, or equal to about thirty per cent.

This is a satisfactory indication of the improved financial condition of the Province at large, especially in view of the fact that the increased jurisdiction conferred upon the Division Courts by the amendment to the Division Courts Act in 1880 would materially add to the number of suits entered. This Act came into force on the 6th March, 1880, and gave jurisdiction up to \$200 in cases

DIVISION COURT STATISTICS—MODE OF ENFORCING JUDGMENTS OF THE COURTS OF APPEAL.

where the liability of the defendant was ascertained in any manner by his signature, and by the same Act the jurisdiction in actions of tort to recover damages to \$40 was increased to \$60. We have only the returns for suits of the increased jurisdiction for ten months of 1880 (the amended Act being sanctioned on the 6th March, of that year), but if a proportion of one-sixth (equal to two months) be added to the returns furnished for 1880, a comparison can be effected between the years 1880 and 1881.

The falling off in suits for amounts exceeding \$100, taking those figures, would be about 15 per cent. The number of these suits entered for the ten months of 1880 was 3,592, and the number for the twelve months of 1881, 3,744.

In looking through the report we find that the six counties having the largest number of Division Court cases in 1881 are the following:—

York, 6,723; Simcoe, 3,024; Middlesex, 2,946; Brant, 2,758; Kent, 2,587; Bruce, 2,543.

In the year 1880 they were:—

York, 7,252; Wentworth, 5,067; Simcoe, 4,000; Wellington, 3,963; Huron, 3,628; Bruce, 3,485.

The most remarkable falling off in the number of cases entered for the year was in the County of Wentworth, where it was over 51 per cent., while in the County of York the decrease was only about $7\frac{1}{2}$ per cent. Another interesting fact is learned by comparing the business done in the County of York with that done in the whole Province. Over one-twelfth of the whole Division Court business of the Province was disposed of by the judges of the County of York in the year 1880, while in the year 1881 they actually performed over one-ninth of the same.

In the year 1880 the aggregate amount of claims entered for suit in the Province was \$2,377,333, and in 1881, the sum of \$1,843,034, showing a falling off in amount of over half a million of dollars.

Of these large amounts there was paid into Court in 1880 \$894,556, and in 1881, \$727,905, being about forty per cent. of the aggregate amounts in each year. The balance, or 60 per cent., would be represented by amounts paid by defendants to plaintiffs outside of the Court, judgments for defendants, nonsuits, reductions in amounts claimed by plaintiffs, set offs, &c., &c., and by uncollectable claims. If we assume that about 40 per cent. would be accounted for by the foregoing causes, except the last, it would leave about 20 per cent., which might not unfairly be set down as the probable amount of claims uncollectable.

There are 307 separate divisions in the various counties in which a Court is held, in a large proportion of them as often as six times a year, while in the case of cities, the Courts are held about once a month. There were 146 jury trials in the Division Courts of the Province in 1880, and 223 in 1881.

We have not space for more extracts, but the Report contains much information, valuable alike to the profession and our Legislators, and confirms the many opinions as to the importance and usefulness of our Division Courts.

MODE OF ENFORCING JUDGMENTS
OF THE COURTS OF APPEAL.

The much vexed question as to the proper mode of enforcing a judgment of the Court of Appeal has reached another stage in the recent decision of the Court of Appeal in *Lowson v. Canadian Farmers' Insurance Co.*, ante, p. 293, but we do not think that it has even yet reached a satisfactory solution. The Appeal Act, R. S. O., c. 38, s. 44, says: "The decision of the Court of Appeal shall be certified by the Registrar of the Court of Appeal to the proper officer of the Court below, who shall therefore make all proper and necessary entries thereof; and all subsequent

MODE OF ENFORCING JUDGMENTS OF THE COURTS OF APPEAL.

proceedings may be taken *thereupon* as if the decision had been given in the Court below."

Prior to the Judicature Act two methods of carrying this section into operation prevailed. At law the certificate was, as we understand from *McArthur v Southwold*, 7 P. R. 27, acted upon without making it an order of the Court below, but we believe it was the practice to enter the certificate on the roll of the proceedings, and thereupon without any other physical alteration of the original judgment the certificate of the Court of Appeal was acted on as though it were a decision of the Court below.

In Chancery, however, a practice had grown up of making the certificate of the Court of Appeal an order of the Court of Chancery, and it was only on being so made an order in Chancery that it was enforceable in that Court: *Weir v. Matheson*, 2 Chy. Ch. R. 10.

In *Freed v. Orr*, 9 P. R. 181 (17th January, 1882), the Master in Chambers held that it was no longer necessary to make a certificate of the Court of Appeal an order of the High Court.

In February, 1882, Proudfoot, J., held that the former practice in Chancery was to be continued: *Norvall v. Canada Southern R. W. Co.* 9 P. R. 339, 18 C. L. J. 98, and on 1st March, 1882, in *National Insurance Co. v. Egleson*, 9 P. R. 202, Boyd C. referred to the practice as correctly laid down by Proudfoot, J., and on the 4th May, 1882, Ferguson, J., after consultation with Boyd C., also decided that the former practice of the Court of Chancery was to be continued in the Chancery Division: *Canada Southern Railway Co. v. International Bridge Co.*, 9 P. R. 203, note.

The matter had also previously been before the Master in Chambers again in *Lowson v. Canada Farmers Insurance Co.*, 9 P. R. 185, and in that case the learned Master set aside an execution, among other grounds, because it was issued upon a certificate of the Court of Appeal. His opinion as to the mode in which the certificate should be dealt with, and which is apparently the one which the Court of Ap-

peal has adopted, is stated as follows, p. 186: After quoting section 44 of the Appeal Act he proceeds: "That is, I take it, that the original judgment shall be in effect corrected by the judgment of the Court of Appeal by the proper officer, whose duty it is to make the entries; and that, upon that original decree of the Court of Chancery, so corrected by the judgment in Appeal, the writ of *fi. fa.* may issue." This not having been done, he held the execution irregular. Before the execution issued, however, in that case the certificate of the Court of Appeal had been actually entered in the judgment book of the Chancery Division, but this very material fact does not appear to have been brought to the attention of the learned Master in Chambers. Subsequently, the decision of the Master in Chambers was affirmed by the Divisional Court of the Chancery Division, upon the ground that the writ had issued prematurely, but the Court gave no decision as to the other point of practice. There can be little doubt, however, that if it had been necessary to express any opinion on the point, that the Divisional Court, as then constituted, would have pronounced in favour of continuing the old Chancery practice of making the certificates of the Court of Appeal an order of the Chancery Division.

In June, 1882, however, the question again came up before the Divisional Court of the Chancery Division then constituted by Wilson, C. J., and Ferguson, J., in *Norvall v. Canada S. R. W. Co.*, 9 P. R. 339, and although no express decision was arrived at by the Court on the point of practice we have under consideration, Wilson, C. J., thus referred to it: "We know the practice is to make these certificates orders of the Court. Why that is so, although the practice has long existed, I do not know. I can understand a submission to arbitration, or a judge's order, when it was the practice, being made an order or rule of Court, but I do not understand why the orders, decree, or judgment of a Superior Court, having cognizance of the cause, and

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the power to dispose of the cause as it pleases, within the rules of judicial discretion, and which can modify or amend the proceedings as they may think right, and can direct the Court below to proceed as may be ordered, should require to have their decree and judgments made proceedings in the cause in the Court below. They are so by mandate of a superior authority, *and they do not require the adoption of the Court below* before they can be acted upon; and proceedings in appeal are by statute a step in the cause."

In *St. John v. Rykert*, 3 C. L. T. 121, Patterson, J. A., said: "I am not aware of any reason or necessity for making the certificate an order of the Court of Chancery, or that that proceeding is attended with any particular effect. I understand the decision to be a judgment in the cause, which should be acted on in the same way, and by the same machinery, as an order made on rehearing in the Court of Chancery itself. The certificate is not from this Court to the Court below; it is from the Registrar of this Court to the officer of the Court below, who is to act upon it in the exercise of his ordinary ministerial functions."

It is strange that so simple a question could not have been settled without so many contrariant opinions. According to our note of the decision of the Court of Appeal in *Lowson v. Canada Insurance Co.* *ante*, p. 293, that Court has determined that "the proper way of enforcing the judgment of the Court of Appeal is to have the judgment of the Court below amended if necessary according to the judgment in appeal, and when amended to issue process thereon."

Now, as we have already intimated, we do not think this is a very satisfactory conclusion, because it seems to contemplate the necessity of a physical alteration of the judgment of the Court below, against making which there are some very obvious objections. In the first place, the statute does not require it; and, secondly, the judgment of the Court of Appeal not being final, it might lead to serious

difficulties in practice. The same practice to be pursued in regard to certificates of the Court of Appeal, is also prescribed by the Supreme Court Act with regard to certificates of the Supreme Court. Let us suppose a case where the action is dismissed in the High Court, and upon appeal the judgment is reversed, and relief granted. Now, a judgment of dismissal is a very short affair comprised in about two folios, but a judgment granting relief, may extend to some ten or twelve or more folios. If the judgment entered in the judgment book is to be struck out and the judgment granting relief inserted, that alone might be very difficult to do; but it may afterwards happen that the case is carried to the Supreme Court where the original judgment may be affirmed and the judgment in appeal reversed, or it may be varied, which would involve a further physical alteration of the books. If, again, an appeal to the Privy Council be had, and the same process has to be pursued with the certificate of its judgment, it is quite possible to conceive that the judgment books would in time, in some places present a rather curious spectacle. The objections to making physical alterations in existing documents was considered by Fry, J., in *Fox v. Bearblock*, 45 L. T. N. S., 470. The application before him was to make a physical alteration in a Chief Clerk's certificate by striking out certain passages, casting doubt on the applicant's legitimacy. In his judgment Fry, J., says: "I have caused inquiries to be made, not only of my own chief clerks, but of the chief clerks of the Master of the Rolls, and the Vice Chancellors, and I find that, with the exception of one or two cases in which one chief clerk of one of the Vice-Chancellors has made alterations in the certificate, the uniform practice has been not to vary the actual certificate prepared by the chief clerk. In my judgment the practice is right and proper, because I think that anything like tampering with existing documents is a practice to be disapproved of and discouraged. In the next place, the alterations

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which we often directed in the certificate are of that description that it would be difficult to make them on the original certificate." Sir Geo. Jessel, M. R., on appeal (46 L. T. N. S. 145), held that Fry, J., was correct in his statement of the practice, and that "a certificate is no more varied than a decree ordered to be varied is varied by touching the actual writing." We may add, moreover, that it never has been the practice in Chancery where a decree was varied on rehearing, to make any physical alteration in the original decree. From what we have said, therefore, we think it is a plain departure from well-established practice to make any physical alteration in the judgments of the Court below, and a practice the introduction of which is very much to be deprecated. All that was done with a decree on re-hearing, to which Patterson, J. A., very properly compares a judgment of the Court of Appeal, was to enter it in the decree book without making any physical alteration in the original decree, or the entry thereof, and this, we think, is all that should be done with a certificate of the Court of Appeal, or of the Supreme Court. As soon as the certificate of the appellate Court is entered in the judgment book of the Court below, such certificate, *ipso facto*, by force of the statute, becomes a judgment of the Court below, and may be enforced as any other judgment. We have referred to this matter at some length, because if the judgment of the Court of Appeal is to be understood as authorising and requiring physical alterations to be made in the records of the Courts below, we think it a matter that is of some importance, and deserving further consideration before it is put in practice. Considering the diversities of opinion which have prevailed, we are inclined to think a rule of Court should be passed definitely settling the practice to be pursued, and the course suggested by Patterson, J. A., in *St. John v. Rykert*, is, we think, the one that should be adopted by the Court.

SIR H. GIFFARD ON THE NEW ENGLISH RULES OF 1883.

In the English House of Commons on 11th August last, in the debate on the motion of Sir R. Cross—"That an humble address be presented to Her Majesty, praying that the Rules of the Supreme Court of Judicature, 1883, may be amended," Sir H. Giffard, after referring to petitions from a Committee of the Bar and the Law Society of Yorkshire, which he held in his hand, and upon which the motion was founded, and to the fact that the Government had not framed the rules, or incurred responsibility respecting them, said :

"The coming law which had been drawn up by the Rule Committee of the Judges, if not at once challenged, would soon have the force of a statute, and the only mode in which it could be altered afterwards would be by special Act of Parliament. He hoped that since these rules had been published hon. members had taken the trouble to ascertain for themselves what was the character of this new code of law—for such it actually was—which was rapidly becoming a statute, and which would shortly be binding upon all Her Majesty's subjects. The rules had been published in the form of a bulky volume. Rules of such bulk, and involving such important and numerous alterations of the existing law should not be allowed to become law without full and careful consideration. . . . The power that had been given to the judges by the statute under which they had acted was to frame rules for the regulation of the practice and procedure of the Court, and it was declared that if the rules so drawn up by them should remain unchallenged upon the table of the House for 40 days they should have the force of a statute—the only mode of challenging them being an address to Her Majesty praying that they might be amended. The rules which had been framed by the Rule Committee of the Judges, with their appendices, formed a volume of 417 pages, and the volume comprehended a great variety of matters. . . . These rules affected not merely the practice of the Courts in its popular sense, but in the widest sense, important political rights of the public. . . . It was proposed by Appendix O. to repeal 22 sets of rules which were existing Acts of Parliament, setting forth

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the extent and nature of the Acts to be repealed, and unless anybody waded through the whole of this volume he would find it impossible to understand the exact nature of the vast alteration in our whole system of law which these rules proposed to effect. It was not too much to say that by these rules our whole existing code of legal procedure, dating from 1852 downwards, was to be repealed. This was a very important matter, because every change in our legal procedure involved vast expense to the suitor, and, indeed, Baron Martin had once observed that every set of new Rules of Procedure cost the country some three million sterling in litigation.

"The way in which the alteration of the course of procedure was effected was unfortunate, because in a great number of instances where an existing rule was repealed it was re-enacted with what appeared at first sight to be a mere verbal alteration, which, however, on careful examination turned out to be an important and material change, and which, in some instances, gave an entirely new effect to the rule. . . . Deprecating the haste with which they had been pressed upon the House late in the Session, Sir H. Giffard continued: "He was receiving letters every day from all parts of the country, pointing out difficulties that would arise under these rules, and it was because he could not bring these details before the House at this period of the Session that he asked that the consideration of the rules should be postponed until next Session. The whole tone of these rules tended to make Her Majesty's judges absolute despots in the Courts of Law. . . . Doubtless, it had been said that it was the duty of a good judge to increase and enlarge his jurisdiction, but in his humble opinion that was a very immoral view to take of the duty of a judge. Certainly, in the present instance the judges had done their best to increase and enlarge their jurisdiction, because in almost every case in which a question could arise under these rules the judge was to have the power of deciding it summarily. In these circumstances how was that independence of the Bar, which it was so necessary for the good of the public at large should be maintained, to be preserved if counsel were to be met at every turn by the exercise of the discretion of the judge, who was to have the power in every case of punishing by the imposition of costs anything of which he did not approve? On every

point, with regard to which parties had hitherto been entitled to an option, the opinion of a judge was now to be absolute. With all deference to these learned personages, he must point out that after all they were only mortal men, and as such, were liable to error in some cases, and that it would therefore be better for themselves as well as for the public that they should not have this despotic power conferred upon them. He would only refer to one example of what the judges had done in the exercise of their power of making those rules. By an Act known as Sir H. Keating's Act, no defence was permitted to be raised in certain circumstances in an action upon a bill of exchange, and the judges by these rules had by a stroke of the pen simply repealed that Act. They did not say in terms that the Act should be repealed—that would have been too scandalous, but they said that after the publication of these rules no writ under Sir H. Keating's Act should issue. He did not think that under the powers conferred upon them by the Act they were authorized to repeal Acts of Parliament in this summary fashion. What would have been thought if they had taken upon themselves to order that after the publication of these rules no writ of *habeas corpus* should be issued? And yet if they had the power to make a rule in one case they equally had the power to make it in the other No secret was made of the dislike of the judges for trial by jury. He had often expressed his preference for the verdict of a good special jury to the finding of the judge. No doubt barristers who practised on what used to be called the other side of Westminster Hall might take a different view. The judges had no power to interfere with the verdict of a jury, and the tendency to amplify the jurisdiction of the judge in that respect had of late received a check. It was a very dangerous thing to leave it to the discretion of a judge what cases he should try himself, and what cases he should remit to a jury. The only exceptions to that discretion were specified in Order 36, Rule 2, and they were actions for slander, libel, false imprisonment, sedition, and breach of promise of marriage. In these cases either plaintiff or defendant might, by notice to the other side, require the trial to be before a jury. In another class of actions, on special application, a jury trial might be ordered. That was a most undesirable system, and unless people were alive to

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their rights, trial by jury, the principle of trial by jury, might be allowed to disappear. No doubt a jury was given on special application, but such applications entailed costs and repeated visits to the solicitor, unless a man was willing to forego his rights. Those changes were not within the fair limits of procedure—they touched the principles of the law themselves. He did not believe either that the choice of actions for jury trial was a good one. The right should above all be maintained in cases where a man's character and reputation were at stake, as in actions of fraud, actions against directors of companies, actions on bills of exchange, when there might be a good defence of conditional acceptance and conditions not fulfilled.

"Then there was the question of discovery. Under the new system the enlarged right of discovery had been one of the most valuable changes ever effected in the law. But under the new rules they could have no discovery unless the party seeking it deposited £5, and a further payment each time after the first, that he required discovery. Such payments pressed very hard upon the poor suitor, who might be called upon to pay £20 before he could obtain his rights. Then the rules tampered with the laws of evidence. The judges had no power to alter the laws of evidence which did not belong to procedure, but were part of the common law. The judges were to have absolutely despotic rights over the cross-examination of witnesses. By Order 36, Rule 38, a judge might disallow any question which he thought to be vexatious or irrelevant. Could such a rule be said to be only declaratory of the common law? If it were there was no need for it at all; if not, it was a dangerous innovation, and altogether *ultra vires*. Practically there would be no appeal from the decision of the judge in such a case, as the Court of Appeal would decline in almost all cases to interfere with the discretion of the judge who had the witnesses before him. The power of the advocate was thus unduly limited in a manner which might tell unjustly against the interests of suitors. No doubt an advocate might abuse his power, but there were other checks upon such abuse. Besides the judge could not always estimate the relevancy of a question, as counsel was not bound to disclose all that was in his brief. In one case a woman was questioned as to her having borne an illegitimate

child eighteen years before the trial. Such a question under the new rules would certainly be disallowed. Yet that question led subsequently to the conviction of the woman for perjury.

"Then there was a great extension of the power under Order 14 of the Rules of 1875, to obtain summary judgment in cases where there was no defence. That order was intended to be limited to demands for liquidated sums of money; but now that power was extended to actions for the recovery of land. So important a change in the law ought not to be made in a body of rules of procedure, but, if at all only by express enactment after debate.

"Then in what was called third party proceedings, the rules gave the judges despotic power. Under Rule 16, Orders 48, 49 and 52, a third party might, on receiving notice, be absolutely precluded from appearing on the trial.

"There were other rules dealing with the jurisdiction of the County Courts. Many attempts had been made in that House to extend the jurisdiction of those Courts, and the attempts had failed. Now, it was extended indirectly. In cases where there was concurrent jurisdiction the judge had the power, if the action was brought in a Superior Court, of allowing only those costs which would have been incurred if the action had been brought in a County Court. Such a change ought only to be effected by express enactments. With respect to the rules generally, both branches of the profession asked for further enquiry and examination.

"He had petitions for inquiry from the Incorporated Law Society, from the Yorkshire Law Society, and from the recently appointed Bar Committee. Those rules had been settled in secret. The Benchers of Lincoln's-Inn—a body which he feared enjoyed no great popularity—had asked for a copy of them, which the Lord Chancellor had courteously but firmly refused. A similar application on behalf of the Bar Committee had met with a like response. If the House had ever contemplated that a committee of judges—not the whole Bench—would have framed such an enormous body of rules, introducing such momentous changes, it would never have given them the power to do so. It was the Act of 1875 which delegated such vast powers to a small body of judges. He was glad to admit that the Act of 1873, which was the work of a Liberal Government, did not give

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such wide powers to a committee of the Bench. He hoped that the House would not at once give its sanction to the rules, and begged to move—That an address be presented to Her Majesty, praying that the Rules of the Supreme Court of Judicature, 1883, may be annulled.”

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE FIRST DIVISION COURT OF THE COUNTY OF YORK.

PHOENIX MUTUAL INSURANCE COMPANY V.
DEANS.

Mutual Insurance Company—Winding up proceedings—Qualification of directors—Assessment.

An order for winding up under 41 Vict. (Ont.) cap. 5, having been taken out to wind up a Mutual Fire Insurance Company,

Held, that the validity of these proceedings could not be questioned in a collateral proceeding, e.g. in a suit upon one of the undertakings at the instance of the liquidator.

The qualification of the directors being questioned,

Held, that they were qualified, and that a director could qualify upon a policy covering partnership property, as each partner had an insurable interest to the full extent of the value of the firm's stock-in-trade.

Quære, whether the qualification of the directors could be questioned, after a resolution of contributories had conferred express powers to levy assessments on the *Board of Directors*, and whether an assessment by a *de facto* board would not suffice.

The assessment was for the whole of all balances existing upon all undertakings held by the Company.

Held, proportionate and valid.

Held, that previous irregular assessments would not invalidate the final assessment if the effect of irregularity would not decrease the amount called for by the final assessment.

[Toronto. Sept. 5, 1883.

The facts of the case fully appear in the judgment of

MCDougall, J.J.—This is an action brought by the Phoenix Mutual Insurance Company—a Company incorporated under the provisions of R. S. O., cap. 161, and having its head office in Toronto—against the defendant to recover

\$34.12 upon an undertaking given by the defendant, when he effected an insurance in the plaintiff company.

It appears from the evidence adduced at the trial that the plaintiff company is being wound up by proceedings taken under the provisions of 41 Vict., cap. 5, Ont.; and an order dated 3rd March, 1882, directing the winding up of the company, was proved and filed.

It appears that after the granting of the order in question, a special general meeting of the members of the company was held, pursuant to notice, on 21st March, 1882, at which meeting a liquidator, Mr. O. R. Peck, was duly appointed (see 41 Vict., Ont., cap. 8, sec. 8, sub-sec. 4). Certain other resolutions were passed at the same general meeting, amongst others one, conferring upon the directors certain limited powers pursuant to sec. 8, sub-sec. 6 of the Act, which resolution is in following words:—Moved by John Downey, seconded by Charles Nelson, “That, notwithstanding the appointment of a liquidator, the powers of the Board of Directors under secs. 27, 47, 56, and 63 of the Mutual Insurance Act statutes, Ontario, cap. 161, shall be continued.”

Acting, it is alleged, under the powers conferred by this resolution, the directors at a subsequent board meeting held for that purpose, (and at the request of the liquidator) made a general assessment upon all the undertakings and premium notes, held by the company, which assessment, it appears from the evidence, was a call for the entire balance outstanding upon each and every premium note and undertaking in the hands of the company, at the date of such assessment, 21st April, 1882, and amongst the undertakings so assessed was the undertaking signed by the defendant. This assessment not having been paid by the defendant and others, the liquidator has commenced a number of actions in the First Division Court of the County of York in the name of the plaintiff company (see sec. 9, sub-sec. 1 of the Winding up Act) to recover the same.

The principal objections may, I think, be summarized as the following:

1. That the provisions of the Winding up Act do not apply to this Insurance Company, because the plaintiff company is virtually, if not actually, insolvent. The Act, it is urged, is only intended to apply to the case of a solvent

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company desiring to wind up its affairs and withdraw from business.

2. That the company, even if within the Act, or if treated as levying this assessment under their statutory powers, was not *sui juris* at the date of the assessment in question, 21st April, 1882, as it did not possess a *de jure* Board of Directors, and that the assessment so levied is therefore simply nugatory and void.

3. If the assessment is properly and legally levied—under the company's statutory powers, or otherwise—the assessment is itself invalid, because it is not an assessment upon the premium notes and undertakings "in proportion to the amount of the said notes or undertakings" (R. S. O. cap. 161, sec. 50); that the resolution directing the same is irregular and informal, and does not comply with the statute in that behalf; that prior assessments of the company—notably those of the 11th November and 16th December, 1881—were also irregular and invalid, and the premium notes and undertakings assessed under such former invalid assessments are not included in the assessment in question—in other words, they are not re-assessed, and therefore, the present assessment is hopelessly and incurably defective, even if a general assessment of all balances unpaid upon all premium notes and undertakings could under all the circumstances of the case be sustained.

As to the first point, that the provisions of the Winding up Act do not apply, I do not think I need dwell long upon this objection. That is an objection which I think should be taken in the original proceedings, instituted for the purpose of winding up the company. The Winding up Act, by sect. 27, gives the right of appeal from any order of the County Judge to the Court of Appeal or one of its judges, which right would of course extend to the initial winding up order equally with any other. It has already been held by the Court of Appeal that insurance companies, incorporated under Provincial statutes, fall within the classes of joint stock companies affected or intended to be affected by the Winding up Act, and that too, notwithstanding other statutory provisions, may give special powers to the Court of Chancery to deal with the Government deposit of insurance companies: *Re Union Fire Insurance Co.* 7 App. R. 783. It appears also from the winding up order obtained in the case of the present company, that the company as

such was represented by counsel upon the application of the petitioners, for the order in question, before the County Judge, and as the defendant is a member of the company I think he cannot be heard to attack the validity of the order in this collateral proceeding, he being deemed in law to be a party to the obtaining of it. Any question of lack of power in the judge to grant the order, or of the peculiar condition of the company's affairs, taking the case out of the operation of the Act, would be questions to be settled by appeal to the proper tribunal. Sitting as a judge of first instance, and with this order unreversed and unappealed against, I must assume that the proceedings leading to its issue were regular, and am only concerned in the regularity and validity of the subsequent steps alleged to have been taken under the Winding up Act, whereby it is claimed that this defendant has become liable to pay the amount of his undertaking: *Upton v. Hansborough*, 3 Bissel N.Y. 426.

The second objection is more formidable, and will require closer consideration.

The Winding up Act, by sect. 8, sub.-sect. 1, points out the consequences of proceedings to wind up: "The company shall, from the date of the commencement of such winding up, cease to carry on its business except in so far as may be required for the beneficial winding up thereof . . . the corporate state and the corporate powers of the company shall, notwithstanding it may be otherwise provided by the Act, charter, or instrument of incorporation, continue until the affairs of the company are wound up."

Sub-sect. 6 enacts, "Upon the appointment of liquidators all the powers of the directors shall cease except in so far as the company, in general meeting, or the liquidators may sanction the continuance of such powers."

In this case the company, at a general meeting of its members, subsequent to the winding up order, expressly sanctioned the continuance of certain powers to the directors, amongst others the power to levy assessments under sec. 47 of R. S. O. cap. 161; and the assessment sued for in this action is an assessment levied by the directors pursuant to these express powers so conferred upon them. But it is contended that on the 21st April, 1882, (the date of the assessment), or even at the date of the general

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meeting, 21st March, 1882, when these special powers were conferred by the company upon the directors, or indeed for some time prior to the date of the order for winding up (3rd March, 1882,) no valid board of qualified directors existed; and it is urged that this fact, if true, renders all proceedings subsequently taken by the so-called directors, or the *de facto* board, absolutely nugatory and void.

Now, what are the facts on this point established by evidence?

The names of those gentlemen who were present, calling themselves directors, on the 21st April, 1882, and who passed the resolution authorizing the assessment disputed, were Messrs. John J. Withrow, Thos. Mara, Wm. Myles, and C. H. Nelson. Of these Mr. Mara was undoubtedly qualified at the date of his election, and up to the 1st of April, 1882, when, by an entry on the books of the company of that date, said to be in the hand-writing of an assistant book-keeper of the company, his policy is marked cancelled. He appears to have paid up his premium note in full, and his policy would not expire by effluxion of time till 15th of December, 1882, therefore, the question of his qualification turns wholly upon the effect of the alleged cancellation of his policy.

Mr. Myles is in a somewhat similar position, he having been duly qualified at the date of his election. He had paid his premiums in full, and his two policies would not expire until June, 1882, but both were marked cancelled in the same assistant book-keeper's handwriting, in January, 1882, the latest entry of that fact being on January 23, 1883. To deal with the cases of these two gentlemen first:

They were both duly qualified at the date of their election as directors, had paid their premium notes in full, their policies were current for a period long subsequent to the date 21st April, 1882, when they purported to act as directors and levy the disputed assessment. We do not find any minute or resolution of the Board of Directors directing the cancellation of their policies, and the liquidator, Mr. Peck, (who had formerly been the inspector of the company) states that the entries of the alleged cancellation are in the hand-writing of Mr. Lightbourne, an assistant book-keeper of the company. In Mr. Myles' case his policies were so marked cancelled, one on 3rd of January, 1882,

and the other on 23rd of January, 1882, in Lightbourne's handwriting, yet Mr. Myles appears to have continued to act as a director, for his name appears in the list of those present (though apparently erased) at a Board meeting on 28th of February, 1882, (after the alleged cancellation), a meeting held apparently just before the annual meeting of the company; the minutes of that meeting appear to be signed by him. Now it is quite clear that no cancellation of Mr. Myles' policies would be of any effect without his consent, he having paid his premium notes in full, unless the company duly notified him and made a return to him of a proper proportion of his premium: R. S. O. cap. 161, secs. 31 and 44. Neither Mr. Myles nor Mr. Lightbourne were called by the defendant to explain the so-called cancellation. Upon the evidence before me I must therefore hold Mr. Myles a duly qualified director at the date of the assessment.

Mr. Mara's case is slightly different, for his policy does not purport to be cancelled until after the liquidation proceedings had been instituted, and when called himself as a witness he says he desired his policy cancelled but that he took no steps to procure its cancellation except to speak to a Mr. Brandon, a local agent of the company at Toronto, to get it done, as he desired to effect insurance on the property covered by the Phœnix policy in some other insurance company. Now the cancellation of a risk at the option of the company under sec. 43 of the Mutual Act, and the cancellation of a policy at the instance of a member of the company under sec. 31 of the same Act, appear to me to be quite different things. Cancellation under sec. 44 would *doubtless* require the sanction or action of the directors, but a cancellation under sec. 31, at the request of a member, requires the express assent of the directors. Now all the powers of the directors had ceased to exist by virtue of the winding up proceedings, except the powers contained in secs. 27, 47, 56 and 63, which had been expressly continued to them by the resolution of the contributories at their special general meeting of March 21st, 1882. The Board then had *as such* no power to concur in any proposed cancellation under either secs. 31 or 44, unless indeed they were expressly requested to exercise these powers by the liquidator to that end; for it would appear under sec. 8, sub-sec. 6 of the Winding up Act, (41

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Vict. (Ont.) cap. 5), that the liquidator could sanction the continuance of any of their former powers even if such powers were not continued by any resolution passed at a general meeting. I must therefore hold that Mr. Mara was a duly qualified director, on the 21st April, 1882, when the disputed assessment was levied.

The qualification of Mr. C. H. Nelson, another director present at the meeting of 21st April, is also impeached. The facts of Mr. Nelson's position, as detailed in evidence, would appear to be as follows: He was a member of the firm of H. A. Nelson & Sons. At the date of his election to the Board (22nd February, 1881), the firm of H. A. Nelson & Sons had policies in existence in the company, one No. 4717, dated 2nd March, 1880, for \$1,000 for one year; a second, No. 5455, dated June 28, 1880, for \$1,000 for one year; and on the 25th May, 1881, Mr. C. H. Nelson took out in his own name a policy, No. 7110 for \$1,000 for three years.

It was strenuously argued by Mr. Osler, that as the only qualification possessed by Mr. Nelson at the date of his election to the Board, was his interest in the two policies issued to his business firm, amounting to \$2,000, he was not an insurer within section 14 of the Mutual Act to the amount of \$800 at least; and he further argued that if it could be implied or inferred that Mr. Nelson had an interest in these policies to the extent of \$800 at the date of his election, one of these policies expired on the 2nd of March, 1881, and that between that date and the 25th May, 1881, when Mr. Nelson took a policy in his own name for \$1,000, the only qualification he possessed would be his interest as a member of the firm of H. A. Nelson & Son in policy No. 5455 for \$1,000, this policy continuing in force until 28th June, 1881; that it would be too violent a presumption to assume that his interest in a policy for \$1,000, held by a firm (admittedly composed of several partners), would amount to \$800 at least, and that Mr. Nelson had therefore ceased to hold the necessary qualification, and if *so de facto* had ceased to be a director.

There are, perhaps, three questions in view in considering this objection.

1. Can a director qualify upon a partnership policy at all?

2. Assuming this answered in the affirmative, must not the policy in that case be for an amount sufficiently large that on a loss, if the

amount were divided amongst the partners in the proportions of their respective shares according to their articles of partnership, the partner elected a director would be entitled to at least \$800 for his share. Or, in other words, must the director have an absolute individual interest in the policy to the extent of \$800.

3. Can a person not possessing the necessary qualification at the date of his election qualify himself after his election by becoming an insurer for \$800?

The words of section 14 of the statute are: "The directors shall be members of the company and insurers therein, for the time they hold office to the amount of \$800 at least."

Now, there is no doubt but that partners insuring partnership stock would be insurers, and section 8 of the Mutual Act says that the several original subscribers, "and all other persons thereafter effecting insurances therein, shall become members of the said company." So that partners are both insurers and members of the company. Mr. Justice Lindley in his work on Partnership quotes as one of the definitions of partnership the following: Where two or more persons join money, goods, or labour, or all three together, and agree to give each other a common claim upon such joint stock, this is partnership: (Lindley on Partnership, pp. 8. Citing Inst. of Nat. Law. Book 1, c. 13, par. 9).

The interest of each partner in the assets of the firm is not a title to any aliquot part, as a-half a-fourth. Each partner being liable *in solido* for the engagements of the partnership has a right which is termed his equity to have the firm assets applied in the first instance to the payment of the firm debts—an equity through the instrumentality of which the partnership creditors have a priority over separate creditors to be paid out of the partnership funds. The interest of a partner is therefore only such a proportion of the capital and profits, as by the original articles of partnership or agreement he may appear to be entitled to receive after all the debts are paid and the affairs of the concern liquidated and wound up. It is plain, then, that each partner has an insurable interest in the entire stock, and on receipt of insurance upon a loss, must account therefore to the partnership: *Manhattan v. Webster*, 59 Penn. 227; *Groves v. Boston Marine Insurance Co.*, 2 Crouch 419; *Page v. Fry*, 2 B. and P. 240; *Murray v. Colum-*

Div. Ct.]

PHOENIX MUTUAL INSURANCE CO. v. DEANS.

[Div. Ct.]

bia Insurance Co., 11 Johns. 302; *Lawrence v. Sebor*, 2 Cains 203.

If this view is correct, any member of a firm, where the firm held a policy for \$800 or upwards, would be interested in the sense of possessing an insurable interest in the entire amount of the policy, and if for the purposes of effecting an insurance he possessed an insurable interest to the extent of \$800, though the policy covered partnership property only, he would be, in my opinion, an insurer to the amount of \$800 at least within the meaning of section 14 of the Mutual Act.

But should this view not be correct, Mr. Nelson at the date of the levying the assessment in question held a policy in his own name for \$1,000, and thus, while acting as a director in the premises was, as a fact, possessed of the necessary qualification in his individual right. Section 14 does not say that a member is ineligible for election who does not possess the necessary qualification at the date of his election, but that he is to possess the qualification during the time he holds office. Mr. Nelson was a member of the company, and whatever doubt may have existed as to his qualification to serve as a director was removed by his taking out the policy of 25th May, 1881. No steps had been taken to declare a vacancy in the Board, and in a case like this if a *de facto* Board is found acting—and acting in this case under a direct resolution of the contributories, or members of the company—upon a scrutiny of the qualification of the directors, if it appears that at the date of performing the ministerial act complained of, they were, in fact, duly qualified, I do not think a Court of Equity and good conscience would be astute in finding technical reasons for declaring void the acts of such a Board, or decide hastily to render nugatory the acts of such a Board in their efforts, in good faith, to realise the assets of the concern for the benefit of their creditors.

It is not necessary to the decision of this case to go so far, by reason of the conclusions I have hereinbefore expressed, but were it necessary to the decision of the case I should feel inclined to hold that any *member* of the company elected to the position of a director on being notified of that fact, could immediately qualify himself before entering upon his duties, by taking out a policy for the required amount, did he not hold sufficient insurance at the date of his election. For the

reasons expressed I hold that Mr. C. H. Nelson was a duly qualified director at the date of levying the disputed assessment.

The effect of my view as to the qualifications of the foregoing three gentlemen to act as directors is to hold that on the 21st April, 1882, there was a duly qualified quorum of the Board of Directors; and this conclusion renders it unnecessary to consider the position of Mr. J. J. Withrow, who also acted on this occasion. I am strongly of the opinion, in view of all of the facts proved in evidence in his case, that it is more than doubtful if the cancellation of the policies in favour of his firm was regular and effective, and that as he continued to act as a director on the 21st April, and the *de facto* Board were duly authorized by the resolution of 21st of March, 1882, by the members of the company to perform the very acts now complained of, the defendant should not now be allowed to set up the defence that these acts are void because the agents nominated by himself directing them to be done are not *de jure* directors: *Appleton Mutual Fire Ins. Co. v. Tessor*, 5 Allan (Mass.) 446; *Wyld v. Ames*, par. 286; *Re County Life Association*, L. R. 5, Ch. 288; *Re Canada Land Co.*, L. R. 14, Ch. D. 660; *Brice on Ultra Vires*.

As to the objection that there must be a full Board of at least five directors under sec. 4, that section was complied with because more than five directors were originally elected, but it does not follow that because certain members of the Board ceased to be qualified, and their colleagues failed to fill up the vacancies, that the corporation is thereby dissolved or the Board incapable of acting. Section 22 constitutes three directors a quorum, and gives them power to transact all business in connection with the company: *Thames Co. v. Rose*, 4 M. & G. 552.

There being then in my opinion a qualified board of directors capable of transacting business under the limited powers conferred by the resolution of 21st of March, 1882, and capable of exercising powers sanctioned by the liquidators: sec. 8, sub-sec. 6, Winding up Act, I must now consider the validity of the assessment levied by them.

[The learned judge then proceeded to consider the financial standing of the company, and showed that taking into account the difficulty of collection, the assets of the company are proved to be less than the liabilities, and as sufficient

PHENIX MUTUAL INSURANCE CO. V. DEANS—RECENT ENGLISH PRACTICE CASES.

losses occurred during the currency of the undertakings an assessment of all outstanding balances upon premium notes would be proportionate. He then proceeded to deal with the objection of Mr. Osler, that two former assessments were irregular, and that as a consequence the undertakings assessed in such former assessments not being included in the final assessments rendered the final one void. He held that there was not sufficient evidence of any irregularity, and that the objection is not open to the defendant, as he was not included in such former assessments, and that it appeared from the evidence that even if such undertakings, assessed in the alleged irregular assessments, had been included in the final assessment, the final assessment would still have required the calling in of all outstanding balances on all undertakings, and that therefore the defendant had not been prejudiced by such alleged irregularity. In any event, he would have had to pay the full amount of his undertaking. No fraud was alleged, and no mistake at all affecting the fairness of the assessment had been established, and held that an assessment is not invalidated by small errors made in good faith, and which have not produced damage to the member complaining, citing *Marblehead Mutual Insurance Co. v. Underwood*, 3 Gray (Mass) 210; *Long Pond Mutual v. Houghton*, 6 Gray 77, and concluded his judgment as follows:]

I have discussed this case at considerable length, because the conclusions which I have come to will probably affect the result in a number of cases yet remaining to be tried, but after the most careful consideration of all the objections argued, and of the evidence, and after a perusal of all the cases to which I have been referred by the able counsel concerned, I am of the opinion that the objections taken ought not to be allowed to prevail, and that the defence therefore fails. I am pressed, too, by another consideration—the chief creditors of this company are members of the company itself—members who have been unfortunate enough to incur fire losses, and who look not unnaturally to their fellow members to abide by their several undertakings, and to submit to any assessment necessary to provide funds for meeting their claims. All the members were in the same boat, and the present creditors might, had not the fates been unpropitious, been the losers to the extent of their undertakings only instead of, in many in-

stances, to the amount of their policies. In a matter, then, like this, which is really a contest between partners, I think it would be unjust and inequitable in the highest degree, except upon the clearest evidence and for the soundest of legal reasons, to hold that any mere technical objections, or slight errors or mistakes should be allowed to prevail, and the efforts to realize the available assets of the company utterly frustrated. It is manifest that even with the utmost prudence, skill and care, a large portion of these assets will not be collected. Should the liquidator be more than usually successful I fear there will be, nevertheless, a considerable deficiency, and that creditors cannot hope to be paid in full. In this case the defendant has failed, in my humble judgment, to make out a defence which will relieve him from the liability he has incurred by subscribing his name to the undertaking sued upon.

There will be judgment for the plaintiffs for \$34.12 and costs.

RECENT ENGLISH PRACTICE CASES.

BROWN V. COLLIS.

Imp. J. A. s. 18, 19—Ont. J. A. s. 13—Court of Appeal—Jurisdiction.

[W. N. 83, p. 155.]

A judge of first instance cannot send a petition direct to the Court of Appeal without his making any order. The Court of Appeal has no jurisdiction to hear the petition in the first instance, but the case can only be brought before them on appeal after the judge of first instance has decided it.

IN RE LEE AND HEMINGWAY.

Imp. O. 55, r. 1—Ont. r. 428—Discretion as to costs.

Land belonging to persons under disability was taken by a company under the compulsory powers of a special Act. A petition was presented for payment out of the money to persons who had become absolutely entitled. The Act contained no provision for the payment by the company of the costs of such a petition. The petition asked that the company might be ordered to pay the costs.

Held, under the Judicature Act, the Court had a discretion to order the company to pay the costs. *Ex parte Mercer*, L. R. 10 Ch. D. 481 followed.

DANFORD V. MCANULTY.

Imp. O. 19, r. 15—Ont. r. 144—Action for recovery of land—Pleading possession—General principle of construction of Judicature Rules.

[L. R. 8 App. Cas. 456.]

In an action for the recovery of land a statement of defence alleging that the defendant is in possession operates, by virtue of the above rule, as a denial of the allegations in the plaintiff's statement of claim, and requires the plaintiff to prove them.

The obvious intention of this exceptional rule seems to be to leave the defendant in an action for the recovery of land in the same position substantially as he was before the Judicature Act and Rules, that is to say, entitled to rely on his possession as a sufficient denial of the plaintiff's title and a sufficient answer until the plaintiff had proved his title, and then enabling the defendant to rely on any defence he could prove though he had not pleaded it.

The Judicature Rules are to be construed so as to discover the intention expressed in the rules, and it is not a legitimate ground of construction for the person or persons who drew the rules to say, "We wished and meant to express a particular intention." That is not a legitimate ground upon which to construe any instrument in writing.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

Wilson, C. J.]

MCKNIGHT V. CITY OF TORONTO.

Municipal by-law — Nuisances — Prohibition against keeping swine and cows, validity of.

The defendants passed a by-law pursuant to R. S. O. ch. 174, sect. 466, sub-sect. 17, as amended by 44 Vict. ch. 24, sect. 12, which by-law, by sect. 2, provides that "no person shall keep, nor shall there be kept, within the City of Toronto, any pig or swine, or any piggery."

Held, that the by-law was *ultra vires* as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances.

By sect. 3, sub-sect. 2, the by-law provided that no cows should be kept in any stable, etc., situate at a less distance than forty feet from the nearest dwelling-houses, and where two cows were kept that the stable should be not less than eighty feet from the nearest dwelling-houses.

Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration; that the distances prescribed were reasonable; and that the by-law as to that was unobjectionable.

Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling-house, and

Held, that this objection not being clear should not at any rate be allowed to prevail in favor of the applicant, whose case was not shewn to be within the terms of the objections.

Read, Q.C., for applicant.

McWilliams, contra.

Cameron J.]

STAR KIDNEY CO. V. GREENWOOD.

Sale of medicinal composition—Representation as to curative properties—Discovery of ingredients.

Action on a promissory note given by the defendant in payment for a quantity of pads made by the plaintiff, and said to possess curative properties when applied to the body. The defence was that the note was obtained by fraud, and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula, or recipe, from which the pads were made, in order to show that they were valueless, which the plaintiff refused, on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business.

Held, that the defendant was not entitled to the discovery.

Osler, Q.C., for the motion.

Bethune, Q.C., contra.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

IN RE CANADA, ATLANTIC, &C., R. CO. AND
TOWNSHIP OF CAMBRIDGE.

Municipal Corporation—Railway aid—Debentures—Mandamus.

Held, following the decision of the Supreme Court of Canada in *Re Grand Junction Railway and Peterborough* (not yet reported), that a writ of mandamus to compel the issue of debentures by a Municipal Corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action.

CHANCERY DIVISION.

Divisional Court.]

Sept. 12.

CAMPBELL V. MCKERRICKER.

Promise to make a will—Representation—Part performance.

In this case the plaintiff claimed to be entitled to certain land on the ground that his father in his lifetime owned the land, and that in sundry ways his father became indebted to him, and in 1870, in a settlement of accounts between them was found to owe him \$540, and that his father then induced him to abstain from enforcing his claim for the said sum, and further, to go on working on the land with him, by representing that he would devise the land to him, the plaintiff, and that after coming to this agreement, his father represented to him that he had devised the land to him (as, indeed, he had), and so induced him to abstain from enforcing his claim for the \$540 until now the period of limitations was gone, and also to remain and work on the farm for several years, but that his father had, nevertheless, revoked the former will, by a subsequent one devising the land to the defendant.

Held (reversing the decision of Proudfoot, J.) that the plaintiff was entitled to the land in question, for there was no sufficient part performance to take the case out of the Statute of Frauds. Such acts of part performance must be done by the party seeking to enforce the contract, and they must be such as to manifest from their nature that there is some contract between the parties touching the land in question. But here the only act of part performance was the execution of the prior will, but that was the act of the person whose estate is sought to be charged, and, moreover, the mere execution of the will does

not import a contract, but only indicates a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature.

The statement that the father had represented that he had devised the land to the plaintiff, so as to induce him not to enforce his claim for \$540, was not proved, and *quære* whether if it had been it would have entitled the plaintiff to succeed. But different considerations would have arisen if the frame of the action had been on a representation by the father that he had made a will, which being in satisfaction for the wages, he agreed should be irrevocable.

The doctrine of part performance exempting a case from the statute is not encouraged by the trend of modern decisions. The strict boundaries of the law on the subject are fixed by the House of Lords in *Alderson v. Maddison*, L. R. 8 App. 467, and the decision in this case only adopts the principles laid down in that one.

B. B. Osler, Q.C., C. Moss, Q.C., and N. Mills, for the appellants.

M. Wilson for the respondent.

Full Court.]

[Sept. 15.]

WETHERELL V. JONES.

*Constitutional law—B. N. A. Act, s. 92, subs. 14
31 Vic., c. 76 Dom.*

Held, the Act 31 Vict. c. 76 (Dom.) being an Act to provide for taking evidence in Canada in relation to civil and commercial matters pending before Courts of Justice in any other of Her Majesty's Dominions, or before Foreign Tribunals, is not *ultra vires*, and an order made by Proudfoot, J., under the above statute, for the examination of certain witnesses resident in Ontario under a commission and letters rogatory from the circuit Court of Cook County, Illinois, upheld an appeal.

The provisions of the above statute do not affect the administration of justice in this province within the meaning of B. N. A. Act, sec. 92, subs. 14, by which exclusive jurisdiction as to the latter is vested in the Provincial Government. For the taking of evidence in this province to be used in civil actions pending in foreign tribunals is of *extra-provincial* pertinence, and not a matter relating to civil rights in the province. The observations of Lord Selborne in *Valin v. Langlois*, L. R. 5 App. 120, answer

all contentions to the contrary, viz., "There is nothing [in the B. N. A. Act] to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces."

The line of reasoning in *re Niagara election case*, 29 C. P. approved of.

W. Nesbitt for the appellants.

G. H. Watson contra.

Divisional Court.]

Sept. 29.

MARTIN V. MILES.

Right of tenant to redeem mortgage.

The decision of Wilson, C. J. C. P. D. noted *supra*, p. 228-9, reversed so far as he held, that to grant or withhold redemption was a matter of discretion with the Court, and in the exercise of such discretion, withheld redemption.

Held now, the judgment should be for redemption by the plaintiff and with costs of action, if the tender before action was sufficient; if not sufficient, the costs should be added to the mortgagee's debt, except the extra costs occasioned by disputing the right to redeem, which should be deducted from what the plaintiff is to pay; and there should be a reference as to the sufficiency of the tender if the parties failed to agree.

The equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitation, it exists as a right, and an estate over which the Court has no discretionary power. One will search the English books in vain to find anything upholding the view that the Court exercises discretionary power in granting redemption to a person interested in the equity of redemption.

Arnoldi for the appellant.

Beck for the respondent.

PRACTICE CASES.

Mr. Dalton, Q.C.]

[Sept. 3.

HUYCK V. PROCTOR.

Judgment against executors de bonis propriis.

The plaintiff sued upon two promissory notes made by the defendant's testator. To this the de-

fendants pleaded, 1st, that they never were executors; 2nd, *plene administravit*. Issue was joined, and upon the trial a verdict was found for the plaintiff for \$703.77. Upon this a judgment was entered for the debt and costs to be levied of the goods of the testator in the hands of the executors if they have so much thereof, and if not then to be levied of the proper goods and chattels of the defendants.

This was a motion to amend the judgment and writs of execution issued pursuant thereto.

Held, that the verdict on the record as framed warranted the judgment entered.

Aylesworth, for the defendants.

Watson, for the plaintiff.

Mr. Dalton, Q.C.]

[Sept. 10.

GRAND JUNCTION RY. V. COUNTY OF
PETERBORO'.

Staying proceedings where costs of former proceeding unpaid.

In 1879 the Grand Junction Railway obtained from the Court of Queen's Bench a rule for a *mandamus* to enforce the delivery of bonds by the defendants to the amount of \$75,000, pursuant to a by-law of the defendants to aid in the construction of the plaintiff's road. On appeal to the Court of Appeal this Rule was discharged, and on appeal to the Supreme Court of Canada the Court of Appeal's judgment was affirmed with costs against the plaintiffs. Since then the road has been completed, but the costs of the above proceeding have not been paid. This present action is brought in the name of the Grand Junction Railway and the Midland Railway to recover the aforesaid sum of \$75,000 in money.

Upon motion to stay all proceedings in this action till the costs of the former proceeding shall have been paid:

Held, notwithstanding that new circumstances have arisen, and the proceeding is not the same as the first proceeding, nor grounded upon exactly the same facts, and notwithstanding that the Midland Railway Company are now joined as plaintiffs, the attempt to proceed in this action without first paying the costs of the former action is vexatious, and the order asked for must be made: following *Cobbett v. Warner*, L. R. 2 Q. B. 108.

McPhillips, for the plaintiffs.

Marsh, for the defendants.

Armour, J.]

[Sept. 11.]

MIDDLESEX ELECTION PETITION (DOM.)

WALKER V. ROSS.

*Extending time for trial—Discretion of judge—
38 Vict. (D.) ch. 10, sect. 2.*

An application to extend the time for the trial of the Election Petition. It was conceded on both sides that more than six months had elapsed from the filing of this petition before this application was made.

Held, that the provision of 38 Vict. cap. 10, sect. 2, that the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem* until the trial is over, unless on application, supported by affidavit, it be shown that the requirements of justice render it necessary that a postponement of the case shall take place, is directory only.

A judge has a discretion and a power to extend the time for proceedings to the trial of the petition, although the six months has expired before he is applied to.

Order made extending the time for six months.

Scott, Q.C., for the petitioner.

Bethune, Q.C., for the respondent.

Chy. Div.]

[Sept. 15.]

DARLING V. CULLATTON.

*Interpleader—Right of sheriff to order—
Delay—Discretion.*

An interpleader matter. The sheriff seized the goods in question on the 31st of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor, (the assignee being an officer employed by the sheriff,) and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and in his affidavit, filed on the interpleader appli-

cation, referred to a conversation which he had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the plaintiff's hands. The sheriff also swore that he related what the claimant's solicitor had said to the plaintiff's solicitor. The sheriff's excuse for his delay, from the 13th of February to the 5th of March, was that he did not understand that it was his duty to take the initiative.

An interpleader order was made by Mr. WINCHESTER, sitting for the Master in Chambers, but was set aside upon appeal to PROUDFOOT, J.

Upon appeal by the plaintiff to the Divisional Court of the Chancery Division:

Held, that the plaintiff sold with the consent of both parties, and did not therefore improperly exercise his own discretion, so that the contest properly arises as to the proceeds of the sale.

Held, that the delay, from the 13th February to the 5th March, no opportunity of trial being lost, was not unreasonable.

Held, that the fact of the claimant being an officer in the employment of the sheriff, made no difference.

Per BOYD, C.—The disposition of the Court is to be more liberal in relieving the plaintiff now than formerly.

Clement, for the sheriff appellant.

*Hoyle*s, for the claimant.

J. A. Paterson, for the execution creditor.

Ferguson, J.]

[Sept. 17.]

RE CRAIG.

Application under V. and P. Act, (R. S. O. cap. 109) — Order thereon — Subsequent remedy where purchaser fails in his contract.

An order made upon an application under the Vendors' and Purchasers' Act upon the 21st of May, 1883, besides dealing with the title to the land in question, contained a clause directing the purchaser to carry out his contract to purchase forthwith. The purchaser failed to carry out his contract.

On the 17th September, 1883, *A. C. Galt*, for the vendor, moved, on notice, for an order directing the purchaser to pay his purchase money into Court, and in default of his so do

ing within period to be limited by the order, for leave to resell the property.

FERGUSON, J., doubted whether an order, which in fact amounted to a decree for specific performance, could be made under the Act.

A. C. Galt cited the case of *Thompson v. Ringer*, 44 L. T. 507, where a bill filed by a purchaser for specific performance, under circumstances similar to the above, was dismissed on the ground that the parties having once applied to the Court under the Act, all questions thereafter arising between them should be brought before the same tribunal on affidavit, without necessitating the expense of an action.

No cause was shown for the purchaser.

FERGUSON, J., followed the case cited, and made an order directing the purchaser to carry out his contract, in obedience to the former order, within two weeks, and in default for the vendor to be at liberty to re-sell, the purchaser to pay the costs of this motion, all costs of the re-sale, and any deficiency arising from the re-sale.

Cameron, J.] [Sept. 17.

WILBY V. THE STANDARD FIRE INS. CO.

Leave to appeal to the Court of Appeal under sect. 38, O. J. A.

On the 7th of September, 1883, the plaintiff applied for leave to appeal from the judgment of the Queen's Bench given on the 30th of June, 1883, discharging his order *nisi* to set aside the verdict entered at the trial.

By sect. 38 of the O. J. A. it is provided that no appeal shall be allowed unless notice is given in the manner prescribed within one month after the judgment complained of, or within such further time as the Court appealed from, or a judge thereof, may allow.

The plaintiff excused his delay by an affidavit in which he stated that he was advised by his solicitor of the judgment of the Court on the 3rd of July, but that he did not see his solicitor till the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month of the judgment. The plaintiff further swore that he was advised that the case involved questions of law hitherto undecided, and also that another claim was pending in the Chancery Division which would be affected by the result of this case.

The case was one which the learned judge who tried it considered not wholly free from doubt.

CAMERON, J., *held*, that under the circumstances he was precluded by authority from enlarging the time for appeal, and dismissed the motion with costs, referring to the following cases: *In re New Callao*, L. R. 22 Chy. D. 486; *Craig v. Phillips*, L. R. 7 Chy. D. 249; *International Financial Society v. City of Moscow Gas Co.* L. R. 7 Chy. D. 241.

Oster, Q.C., for the plaintiff.

W. N. Miller, for the defendant.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The privilege of counsel and solicitors acting as advocates.—*Irish L. T.*, May 19.

Bills of sale by way of security for payment of money.—*Ib.* June 2.

Contracts on unread conditions.—*Ib.* June 9.

Conditions in restraint of marriage.—*Ib.* June 16, 30, July 7.

Statements by prisoners.—*Ib.* June 23, (from *Justice of the Peace*.)

Betting agents and their principals.—*Ib.* June 30.

Liability for over-holding by under tenants.—*Ib.* July 14.

Employees and dangerous works.—*Ib.* (from *Justice of the Peace*.)

User of dangerous instrumentalities for the protection of property.—*Ib.* July 21, 28.

The right to the custody of children.—*Ib.* Aug. 11, 18, 25.

Common words and phrases.—(Require—May—Obvious danger—Lottery—Seaman—Insolvency—Gone east—Fairly merchantable—Abandoned—Lost—Seize—Device—Embezzle—Manual labour—Ecclesiastical purposes—Issue—Children—Common school.)

—*Albany L. J.*, June 9.

(Regular passenger trains—Locomotive—Engine—Speed—Front part—Assigns—Trial—Premises—Cribbs—Wharfage.)—*Ib.* June 30.

(Lessee—Indorsed—Brought—Commenced—Navigable—Article of manufacture—Debt owing or accruing—Permit—Open—Property—Debtor having a family—Manufacture—Wearing apparel.)—*Ib.* July 7.

Evidence of custom to explain contract.—*Ib.* June 16.

Independence of married women.—*Ib.* June 23.

Defaulting purchaser at judicial sale.—*Ib.* June 30.

The presumption of knowledge.—*Ib.* July 7.

FLOTSAM AND JETSAM.

FLOTSAM AND JETSAM.

SOMETHING LIKE A CIRCUIT.—The arrangements for the Lord Chief Justice's "American Tour," having, according to a contemporary, at length been "substantially completed by the committee," it is satisfactory to find that the whole undertaking promises to prove a great financial success. It has long, of course, been known in legal circles that the beggarly pay received by the leading lights of the Bench, when taken in comparison with the heavy sums made latterly by their more fortunate rivals of the stage, had led to a tension of feeling on the subject that could only find ultimate relief in some spirited outburst. And the determined and business-like prominence of the Lord Chief Justice at a recent banquet, showed clearly in which way the wind was setting. It is therefore not a matter of surprise to hear that by the engagement of an excellent man of business, Mr. Elliot F. Shepard, Lord Coleridge, and the learned *troupe* who accompany him, have already managed before their arrival in the States, to fill up nearly every one of their dates, down to the very day of their return voyage home again across the Atlantic. It is satisfactory, too, to note that, while business has evidently been the guiding motive of all the arrangements, there will be no lack of recreation for the hard-working luminaries *en route*.

Nor is the Dominion behind-hand in graceful attentions to the hard-working *troupe*. Reception is offered them freely on all sides. "At Quebec," the report proceeds, "they get a reception *and a dinner*." This is handsome. At Montreal there is a reception, but no dinner. Ottawa also prefers to indicate its hearty cordiality in the same unobtrusive fashion. There is hand-shaking, but nothing more. But Lord Chief Justice Coleridge, Lord Justice Bowen, Mr. Charles Russell, Q.C., and Mr. Ince, Q.C., and the several other distinguished members of the English Bar who make up the clever performing party, are not likely to resent the elimination of the dining element from the tariff of welcome set before them. Even an injudicious sandwich or two might be too much for them, as a glimpse at the rough sketch of their own capital but arduous programme, suffices to show. In fact, a good deal of severe training will be requisite to enable them to get through it at all. Still the programme, as far as can be gathered from the brief details as yet published, appears to have been capitally arranged with a view to securing the patronage of every class of the community, and large takings may be confidently expected.—*Punch*.

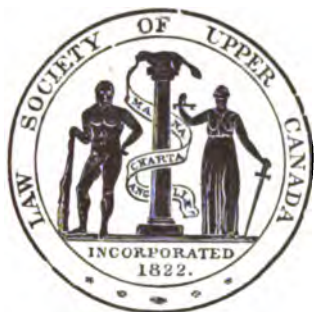
JESTING WITH A CHIEF JUSTICE.—Lord Coleridge's speech at the Irving Banquet was not a success. He is not an effective after-dinner orator, and then he needs people to explain their jokes to him. Mr. Toole, for example, was

frightfully depressed on discovering this fact—for which neither he nor the company were quite prepared. The "Mammoth Comique" of the old Folly Theatre made an allusion to the Tichborne trial, and playfully suggested that Lord Coleridge not only invited him to a seat allotted to a member of the Bar, when the case was going on, but to their "consultation" together. "How far," said Mr. Toole, in accents full of serio-comic earnestness, "in our consultation, I was able to assist him in his difficult task must ever remain a profound professional secret between us;" an announcement received, as might be expected, with peals of laughter. Everybody saw that "Johnny" was simply giving "the Chief" a "cue" for a witty reply—and the dismay that seized on the company when Lord Coleridge took the great jester *au sérieux*, and proceeded with ponderous gravity to give an official and formal denial to the fact that he ever held professional consultation with Mr. Toole on the occasion referred to, was a spectacle never to be forgotten. Mr. Toole is said to have congratulated his friend Irving on having had better luck. "Suppose, Henry," said he on going home, "the Chief had mistaken you for a Comedian."—*Punch Court*.

If the "ball," or cushion-like surface of the top joint of the thumb be examined, it can be seen that in the centre—as, indeed, in the fingers also—is a kind of spiral formed of fine grooves in the skin. The spiral is, however, rarely, if ever, quite perfect—there are irregularities, or places where lines run into each other here and there. Examining both thumbs, it will be seen that they do not exactly match; but the figure on each thumb is the same through life. If the thumbs of any two persons are compared, it will further be found that no two are alike. There may be, and generally is, a "family resemblance" between members of the same family, as in other features; there are also national characteristics; but the individuals differ. All this is better seen by taking "proof impressions" of the thumb. This is easily done by pressing it on a slab covered with a film of printers' ink, and then pressing it on a piece of white paper; or a little aniline dye, Indian ink—almost anything—may be used. The Chinese take advantage of all this to identify their important criminals, at least in some parts of the Empire. We photograph their faces; they take impressions from their thumbs. These are stored away, and if the detainee should ever again fall into the hands of the police, another impression at once affords the means of comparison. The Chinese say that, considering the alteration made in countenance by hair and beard, and the power many men have of distorting or altering the actual features, etc., their method affords even more certain and easy means of identification than our plan of taking the criminal's portrait. Perhaps we might with advantage take a leaf out of their book.—*World of Wonders*.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely :—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewart, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy, Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesley Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesly Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely :—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows:—Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From	{	Arithmetic.
1883		Euclid, Bb. I., II., and III.
to		English Grammar and Composition.
1885		English History Queen Anne to George III.
		Modern Geography, N. America and Europe.
		Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	{	Xenophon, Anabasis, B. II.
		Homer, Iliad, B. VI.
		Cæsar, Bellum Britannicum.
		Cicero, Pro Archia.
1884.	{	Virgil, Æneid, B. V., vv. 1-361.
		Ovid, Heroides, Epistles, V. XIII.
		Cicero, Cato Major.
		Virgil, Æneid, B. V., vv. 1-361.
1885.	{	Ovid, Fasti, B. I., vv. 1-300.
		Xenophon, Anabasis, B. II.
		Homer, Iliad, B. IV.
		Xenophon, Anabasis, B. V.
1885.	{	Homer, Iliad, B. IV.
		Cicero, Cato Major.
		Virgil, Æneid, B. I., vv. 1-304.
		Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

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No: 17.

DIARY FOR OCTOBER.

21. Sun... *Twenty-second Sunday after Trinity.* Battle of Trafalgar, 1805.
22. Tues.... Supreme Court Session begins. Lord Monck, Gov.-Gen., 1862.
24. Wed.... Sir J. H. Craig, Gov.-Gen., 1807.
25. Thurs.. Battle of Balaklava, 1854.
28. Sun... *Twenty-third Sunday after Trinity.*
30. Tues.. . Primary Examination.
31. Wed.... All Hallow Eve. Primary Examination.

TORONTO, OCT. 15, 1883.

OUR lively cotemporary the *Albany Law Journal* (with whom it is charming to have an occasional tilt—his wit is keen and his repartee, though sharp, good natured) waxes even more funny than usual over the absurdity of Lord Coleridge “endangering his health by any such hyperborean journeys as the Canadians would gladly tempt him to . . . They might persuade his Lordship into an Arctic exploring expedition.” The intoxication resulting from the presence of a real live lord all to themselves seems to have been too much for our republican friends. “’Twas ever thus,” however. We have no doubt their distinguished guest will have many a good story to tell of men and things in that connection, when he returns to his ain fireside. As for ourselves we suppose living so near the North Pole keeps us cool in the presence of one with a long handle to his name, to say nothing of our being necessarily somewhat more used to it. The writer also tells us that the Chief Justice had all his expenses paid by the New York Bar Association “from his own door,” until his return, \$2,500 being appropriated for the purpose. Jumbo would have cost more, but would have drawn a larger though not such a select crowd. Waiving the question as to the good taste of the Lord Chief Justice of England

accepting the invitation on such terms, we can join with *Punch* (probably the best exponent of English sentiment on such a proceeding) in hoping that the “large takings confidently expected” by the managers have been duly realized.

THE *Law Journal* (London) has evidently misconceived the feeling of the Bar here on the subject of Lord Coleridge not visiting the Dominion. The feeling was generally one of regret that the Chief Justice could not come, to which was added surprise when it became known that he had, before leaving England, accepted the invitation of our Bar to be in Toronto on a certain day, which fact was known to and accepted by the New York Bar Association, as evidenced by the fact that their secretary wrote to the civic authorities in Toronto warning them of the proposed visit, “that you might have the opportunity of extending to Lord Coleridge any civilities which you may desire.” A few days before the day appointed his Lordship wrote the secretary of our committee saying he could not come. There was of course nothing to do but express regret at the fact, and countermand the almost completed arrangements. Some thought an engagement so made should not be so lightly broken. Others again were somewhat flabbergasted at the suggestion in his letter that though he, the invited guest, to whom, as occupant of so high an office, we desired to pay our respects, could not eat our dinner, he would, if we liked, send some one else for that purpose. This seemed a singular suggestion, but was doubtless made with the best motives, and was so received. Regrets were courteously expressed, and there was an end of the matter. No one was “snubbed”

RECENT ENGLISH DECISIONS.

that we know of, in fact the occasion for such a process did not arise, unless, indeed, it occurred to his Lordship by reason of his suggestion not being accepted, which, under the circumstances, was impossible.

RECENT ENGLISH DECISIONS.

The August numbers of the Law Reports comprise 8 App. Cas. pp. 337-576, 11 Q. B. D. pp. 145-313, 8 P. D. pp. 129-150, and 22 Ch. D. 577.

STATUTORY PENALTY—CROWN AND COMMON INFORMER.

In the last article on Recent English Decisions in this journal reference was made to the case of *Clarke v. Newdigate*, and now the first case to be noticed in the above number of Appeal cases is the case of *Bradlaugh v. Clarke*. It does not, however, seem necessary to dwell here upon the question therein decided, of the construction of the particular statute under which the action was brought, or to do more than allude to the somewhat different view which Lord Selborne and Lord Blackburn appear to take as to the principles on which statutes, which expressly repeal former statutes *in eadem materia*, are to be interpreted. It may, however, be stated that the House of Lords affirms what in the Court of Appeal had been acknowledged as an incontestable proposition of law, viz., that "where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." This, Lord Selbourne says, p. 358, rests on a very plain and clear principle: "No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty of this nature unless it is expressly, or by some sufficient implication, given to him by statute. The Crown, and the Crown alone, is charged generally with the execution and

enforcement of penal laws enacted by public statutes for the public good, and is interested, *jure publico*, in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary. The *onus* is upon a common informer to show that the statute has conferred upon him a right of action to recover the particular penalty which he claims."

CONSTRUCTION OF STATUTES—GENERAL INTENTION.

Attention may also be called to an interesting *dictum* of Lord Blackburn's as to the construction of statutes, at p. 373, to the effect that, "in modern times much more weight has been given to the natural meaning of the words than was done in the time of Elizabeth; and in some cases in which the old judges have given effect to the general intention as over-ruling the particular words, a modern court would have given effect to the particular words as showing that the intention really went further than what was supposed."

HUSBAND AND WIFE—DISABILITIES OF MARRIED WOMEN.

In the case of *Cahill v. Cahill*, p. 420, which is the next requiring special notice, Lord Selborne delivers a very learned judgment on the subject of married woman's disabilities. He repudiates, as does also Lord Blackburn, p. 438, the notion that the common law of England, as to the disabilities of married women was founded on any presumption against the spontaneity or freedom of acts done by the wife when under marital control, or that it was subject to exception whenever there might be circumstances sufficient to repel such a presumption. "The principle of the disability of coverture," he says, "was that stated by Littleton, (sect. 168): 'a man and his wife are but one person in the law,' which is the reason why 'a man cannot grant or give his tenements to his wife during the coverture;' and (as Lord Coke says, in his comment on the same place), 'she is disabled to contract with any without the consent of her husband: *omnia quæ sunt uxoris sunt ipsius viri*.'" But Lord Selborne goes on to point

RECENT ENGLISH DECISIONS.

out that although a married woman could not contract or convey property (not separate) except so far as by common or statute law she was enabled to join with her husband in doing so, she might always, when her interests required it, sue and be sued jointly with her husband, or (in equity) apart from her husband by a next friend; and that one consequence of the *locus standi in curia* of a married woman for the purpose of asserting or defending her rights of property (whether with her husband or by a next friend), and of having the rights of others asserted against her, was that her interests in the subject matter of the litigation to which she was so made a party, might be bound by way of transaction or compromise—which has been in modern times extended to compromises out of as well as in court. It was on this foundation, he says, that the forms of judicial assurance, by which freehold estates of married women were alienated at common law, down to the passing of the Act for the Abolition of Fines and Recoveries, originally rested. But, he continues, “there is no case in the books, before the Act for the Abolition of Fines and Recoveries, in which a married woman was held bound, on the footing of contract (without fine), to alienate her freehold lands or hereditaments not settled to her separate use. And the means of alienating such lands, substituted by those Acts for fine, although no longer founded on the fiction of judicial transaction or compromise, can only be made available by following the procedure which those Acts prescribe.” This brings him down to the crucial question in the case before the House. There a married woman, with a view to a compromise of a suit for restitution of conjugal rights brought by the husband, had signed a document by which it was stipulated that she should release part of a jointure rent-charge to which she was entitled by an anti-nuptial settlement. The House of Lords now decided that, even if a final agreement had been come to, the wife was not bound by it, there having been no acknowledgment as

required by the Act for the Abolition of Fines and Recoveries.

Passing over *Danford v. McAnulty*, p. 456, which will be found among the Recent English Practice Cases, in our last number, the case of *Maddison v. Alderson*, p. 467, is reached, this being the last stage of this interesting case, which was noticed at length in this journal, Vol. 18, p. 334, in connection with the case of *Roberts v. Hall*, 1 O. R. 388.

PROMISE TO MAKE A WILL—PAROL CONTRACT—PART PERFORMANCE.

In the judgments of the House of Lords, which we are now about to notice, “the strict boundaries of the law on the subject of part performance exempting a case from the operation of the statute of frauds are emphatically fixed,” to use the words of Mr. Chancellor Boyd, in his judgment in the recent case of *Campbell v. McKerricher*, (Sept. 15, 1883,) noted in our present number. The facts of the two cases were curiously similar; in both there was an alleged service by the plaintiff, for many years, on the faith of a promise by the deceased to leave him a certain property by will, and in both a will was produced in evidence, or sworn to have been made, actually leaving the property to the plaintiff, but inoperative in the one case from want of proper attestation, and in the other by reason of the execution of a subsequent will, and, to again revert to the words of the Chancellor, in *Campbell v. McKerricher* the Chancery Divisional Court “but adopts the principles of law laid down” in the case of *Maddison v. Alderson*, the effect of which was, in both cases, to find the plaintiff not entitled to recover. Dealing, then, with the doctrine of equity as to part performance of parol contracts, Lord Selborne commences by saying that he agrees with the observation of Lord Justice Cotton in *Britain v. Rossiter*, L. R. 11 Q. B. D. 130, noted in this journal, *supra* p. 268, that it is not an adequate explanation of this doctrine to say summarily that it rests upon the principle of fraud, the

RECENT ENGLISH DECISIONS.

Courts of Equity will not permit the statute to be made an instrument of fraud. Lord Blackburn, indeed, says (p. 488) that he had not been able to discover to his satisfaction what is the principle which is involved in the numerous cases in equity on the subject, but the rest of their Lordships concur in the exposition of the law given by the Lord Chancellor, (p. 475), which is as follows;—"In a suit founded on part performance of a parol contract, concerning land, the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyances; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such cases, a conveyance were refused, and an action of ejectment brought by the vendor, or his heir, against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract, and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible—just) and completing what has been left undone. The line may not always be capable of being so

clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is *reasonably to be inferred from the res gestæ themselves*, justice seems to require some such limitation of the scope of the statute, which otherwise interposes an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

In the light of the above it is easy to understand the remark of Lord O'Hagan, at p. 483, that an erroneous course had been taken in the argument in the case, inasmuch as "instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention," or, in other words, as said by the Chancellor in our recent case of *Campbell v. McKerricher*, the proper order of marshalling the evidence is first to prove the part performance in order to let in parol evidence of the agreement which is sought to be enforced.

PRACTICE—PETITION FOR SPECIAL LEAVE TO APPEAL.

Lastly must be noticed the case of *Canada Central R. Co. v. Murray*, where leave was sought to appeal from the judgment of the Supreme Court of Canada, of May 17, 1883, and leave to appeal was refused on the ground that the questions raised in the cases involved no issue except an issue of fact. Their Lordships also lay down the rule in this case that a petition for leave to appeal to the Privy Council must state fully, but succinctly, the grounds upon which it is based.

A.H.F.I.

LAW SOCIETY.

LAW SOCIETY.

TRINITY TERM—47 VICT. 1883.

The following is the *resume* of the proceedings of the Benchers during Trinity Term, published by authority:—

During this term the following gentlemen were called to the Bar, namely—Messrs. Hugh Archibald McLean, William Jno. Martin, Harry Thorpe Canniff, Henry Carleton Monck, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thos. Parker, Daniel K. Cunningham, David Mills.

The following gentlemen received Certificates of Fitness, namely—Messrs. H. A. McLean, D. M. Fraser, A. J. Reid, A. S. Clarke, W. J. Porte, R. H. Holmes, E. J. Hearn, J. P. Fisher, H. C. Monk, J. N. Marshall, W. L. Haight, M. McFadden, T. Parker, R. Patterson, W. J. Martin, G. W. Ross, G. Morehead, W. A. Stratton, H. T. Canniff, J. A. McCarthy, J. A. Mulligan, R. P. Echlin, P. J. King, T. Chapple, C. W. Phillips.

The following gentlemen passed the First Intermediate Examination, namely—W. S. Brewster, (Honours and First Scholarship), P. D. Cunningham, (Honours and Second Scholarship), E. C. Higgins, J. G. Godfrey, T. H. Hill, C. T. Glass, W. Creelman, H. T. Shibley, W. Douglas, J. Campbell, F. R. Latchford, A. A. Fisher, G. F. Bell, J. M. Rogers, A. W. Marquis, D. McArthur, A. McMurchy, A. McKechnie, E. F. Gunther, G. H. C. Brooke, F. W. G. Thomas, A. D. Hardy, R. A. Pringle, J. W. White, W. A. D. Lees, E. M. Yarwood, R. G. Code, A. W. Chisholm, E. C. Emery, A. W. A. Findlay, G. S. Macdonald, O. L. Spencer, A. C. Steele.

The following gentlemen passed the Second Intermediate, namely—R. Smith (Honours and First Scholarship), L. H. Patten, W. H. Matheson, J. Macpherson, F. G. Lily, D. Macdonald, J. W. St. John, G. H. Jarvis, J. Tytler, M. Wilkins, Jr., E. Weld, T. Johnson, J. W. Berryman, H. Cowan, J. B. Jackson, H. H. Bolton, J. Heighington, J. W. Duncan, I. J. Blair, P. S. Campbell, E. W. M. Flock, J. A. Forin, S. O'Brien.

The following gentlemen were admitted into the Society as Students-at-Law, namely:—

GRADUATES—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewart, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Frasei, William Ernest Thompson, Alfred Buell Cameron.

MATRICULANTS — Alexander James Boyd, John William Mealy, Robert Sullivan Moss, Arnold Morphy, Thomas R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

JUNIORS—Wentworth Green, Frank Sangster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesley Blair, Alexander Duncan Dickson, William George Munro, Edward Henderson Ridley, Alexander Purdom, George Chesly Hart, William Henry Lake, Robert Ruddy.

Monday, September 3rd, 1883.

Present—The Treasurer, and Messrs. Crickmore, Leith, Becher, Moss, Kerr, MacLennan, Robertson, Cameron, Beaty, Bethune, Reid, J. F. Smith, Irving.

Mr. Kerr, from the Committee of the Journals of Convocation, reported that the Committee had prepared a book containing the rules as directed by the resolution of Convocation, with an Index, and the book was laid on the table.

Mr. Read reported that, as Chairman of the Finance Committee, he authorised the use of the Examination Hall by the Congress of Short-hand Writers, and laid their letter of thanks on the table.

Tuesday, Sept. 4th, 1883.

Present—The Treasurer, and Messrs. Becher, Irving, Mackelcan, Bethune, MacLennan, Leith, Crickmore, Cameron, Bell, Murray, Pardee. Read Kerr, J. F. Smith, and McCarthy.

LAW SOCIETY.

Mr. Irving presented the Report of the Library Committee, as to the Supplementary Catalogue.

Saturday, Sept. 8th, 1883.

Present—The Treasurer, and Messrs. Crickmore, Maclellan, Cameron, Read, Irving, Moss, Hardy, McCarthy, Foy, Kerr, and Bethune.

Mr. Maclellan, from the Committee on Reporting, presented their reports as follows :—

REPORT.

To the Benchers of the Law Society of Upper Canada.

The Committee on Reporting beg leave to report as follows :—

All the work of Reporting continues to be in a satisfactory state but the Chancery Reports and the Appeal Reports.

The cases decided in the Queen's Bench and Common Pleas Divisions are all brought down to the present time, but the Committee regrets to find that in the Chancery Division there are large arrears and that the same is the case with the Court of Appeal.

There are between thirty and forty old Chancery Cases in Mr. Grant's hands, which have been in print for a long time, and which are not yet issued, and which should complete Volume 29 of Grant's Reports.

Mr. Lefroy has done an extraordinary amount of work since his illness, but there are still 88 cases unreported, of which about 60 are in print and in various stages of progress. It has now become a question whether one person can do the reporting for this Division efficiently, and whether the Reporters of the other Divisions should not render assistance, or whether there should not be two Reporters on the Chancery Division.

The Appeal Cases unreported number forty, of which twelve were decided in the beginning of February, four in the beginning of March, ten in the end of March, and thirteen in the end of June, none of these cases have yet been delivered to the printer, nor was any note of thirteen of them delivered to the LAW JOURNAL.

The Practice Reports appear to be fairly up, thirty cases have been issued since last Term, and there are fifty-three cases now in print.

The Triennial Digest is said to be ready for the press, and is only kept back in order to in-

clude, if possible, the 29th Volume of Grant's Reports, which is not yet issued. All which is respectfully submitted.

(Signed) JAMES MACLENNAN,
Chairman.

Ordered that it be referred back to the Reporting Committee to confer with the Editor-in-chief and Mr. Grant as to the backward state of 29 Grant, and of the Appeal Reports, to obtain any explanations or suggestions these gentlemen may have to offer, and to consider and report to Convocation what remedy should be applied.

Ordered that the further consideration of the report be adjourned to the next meeting of the Convocation.

Convocation adjourned.

(Signed) EDWARD BLAKE.

Sept. 14th, 1883.

Present—The Treasurer, and Messrs. Crickmore, Becher, Moss, Maclellan, Hardy, McCarthy, Foy, Irving, Murray, Britton, J. F. Smith, Mackelcan, Read.

Mr. Maclellan from the Committee on Reporting, reports as follows :—

1. They have conferred with Mr. Robinson and Mr. Grant, with reference to the incomplete volume of Grant's Reports, and the backward state of the Appeal Reports. and they recommend that Mr. Grant be required to prepare notes of the unreported Chancery Cases, to be inserted in the Digest, without waiting for the publication of the volume, that such notes be all prepared and delivered to the Editor, and to the LAW JOURNAL, on or before the 1st day of October, and that volume 29 be completed within two months from this date.

2. The Committee report that no satisfactory reason has been given for the backward state of the Appeal Reports, and Mr. Grant thinks the forty cases now unreported cannot be issued before January next.

The Committee propose to meet at an early date to resume the consideration of the subject and to report fully at the next meeting of the Convocation. All which is respectfully submitted.

(Signed) JAMES MACLENNAN,
Chairman.

The Report of the Reporting Committee, presented on Saturday last, and ordered to be further considered, was taken up.

SELECTIONS.

Ordered that the paragraph respecting the Chancery Reports be referred back to the Reporting Committee, with instructions to consider and report what remedy should be applied to meet the difficulty stated.

Convocation adjourned.

SELECTIONS.

WHAT DEBTS CAN BE ATTACHED?

THE case of *Webb v. Stenton*, decided by the Court of Appeal, and reported in the September number of the LAW JOURNAL REPORTS, sets at rest one of those numerous doubts raised by the fusion of law and equity. It was a special case stated in reference to a garnishee order. The judgment debtor became, in August, 1882, entitled under a will to 85*l.* a year for his life, payable by trustees in February and August out of the income of a trust fund. On November 11, 1882, a garnishee order *nisi* was made; but an issue was taken on the question whether at that date there was "a debt owing or accruing" from the trustees to the judgment debtor, and the special case was stated in order to decide this question. On the one hand, it was clear that on November 11 there was no sum actually due to the judgment debtor from the trustees; and, on the other, it was equally clear that, in the February following, some 42*l.* 10*s.* would be due from the trustees to the judgment debtor. Could this sum be said to be a "debt accruing" from them to him? The Divisional Court, composed of Mr. Justice Cave and Mr. Justice Day, decided that it could not; and the Court of Appeal has now affirmed that decision.

The process of attachment of debts was the invention of the Common Law Procedure Act, 1864, and in regard to the debts attachable the words used are the same now. Section 61 of the Common Law Procedure Act, 1854, applied the process to "debts owing and accruing" from the garnishee to the judgment debtor. The moribund Order XLV. used the same words, which re-appear in Order XLV. as it is to be in October 24. It may be as well to remark in passing that the new order, although it does not affect the character of debts which may be attached, makes an important extension of the process by allowing it to be employed, not only by a judgment creditor, but by a person who has

obtained an order for the payment of money. The reason for the addition is probably to be found in the rules themselves, which not unfrequently allow orders to be substituted for the more formal process of judgments. The addition may be justified without much difficulty. No doubt a judgment has a deliberation about it not possessed by an order, but it is not to be assumed that an order is likely to be less just, especially when appeals are so freely given; and if a person is adjudged entitled to have money from another, he ought to be allowed to call on the debtors of that other to hand over their debts to him, whether his title depends on an order no less than when it depends on a judgment. With regard to the words "debts owing or accruing," which have been used from the beginning, their meaning is at first sight doubtful, and it may be supposed that an "accruing debt" means something which will, in progress of time, ripen into a debt. The words had, however, clearly been interpreted under the Common Law Procedure Act to mean present debts payable immediately or in the future as in the cases of *Jones v. Thompson*, 27 Law J. Rep. Q.B. 234, and *Tapp v. Jones*, 44 Law J. Rep. Q.B. 127. With one exception, no doubt seems to have been thrown upon these cases, the first of which was decided in 1858. The Court of Appeal was not likely to disturb so uniform an interpretation of an ambiguous phrase except for very clear reasons, and the exception referred to was of considerable weight. In the case of *Re Cowans*, 49 Law J. Rep. Chanc. 402, Vice-Chancellor Hall, in considering the question whether a garnishee order could be made on a receiver appointed in the Chancery Division, and deciding the question in the affirmative, said: "There are authorities which countenance the notion that the attachment must be confined to anything due when the order is made; but I think that good sense goes along with the decision in *Tapp v. Jones* which cannot be taken as having depended on the circumstance that the money in the particular instance was owing at the time." This expression of opinion was not a mere *obiter dictum*, because the Vice-Chancellor made an order extended to moneys coming into the hands of the receiver in the future; but it must now be considered as overruled, being given on a misapprehension of *Tapp v. Jones*.

It may be asked why this *status* should be given to present debts payable in the future,

SELECTIONS.

but denied to such thing as annuities payable in the future. The latter are of as substantial a character as the former, or rather more substantial, especially if secured by a trust fund. The answer is that an annuity is a piece of property, and not a debt. A debt only arises out of it when the person who has to pay it might be sued for an instalment. In the case of a trustee this only happens when he has the money in his hands. It may be that the process of attachment ought to be applicable to property of this character, but as yet the legislature has not so applied it. It would be easy to create a sort of compulsory charge on annuities, and money paid periodically. Whether it would be expedient is another question. At present the right to attach is simply and clearly confined to debts, and although the phrase "accruing debts" is capable of meaning an embryo debt, yet such an interpretation would lead to great uncertainty. There would be difficulty in drawing the line reasonably, and a very distant approach to a debt such as the negotiation for a contract might be considered as within the phrase. So far as the attachment of debts is concerned, proper effect has, we think, been given to the law by the decision in question. If property not of the tangible kind which can be reached by a *fi. fa.* is to be dealt with by any similar proceeding, another and separate definition of the thing to be attached is necessary.—*Law Journal*.

THE vexed question for a provision for attorney's fees in a note was decided in favor of the negotiability of such a note, in *Adams v. Addington*, United States Circuit, Northern District of Texas, January, 1883, 16 Feb. Rep 89, Pardee, J. "As shown by the note of Mr. Adelbert Hamilton to the case of *Merchants' Nat. Bank v. Sevier*, 14 Feb. Rep. 662, the weight of authority is in favor of the negotiability of instruments containing stipulations similar to those contained in the one sued on. And, on principle, why should such instruments not be negotiable? The amount to be paid at maturity is fixed and certain. As to what amount is to be paid in case of dishonor, and after maturity, there may be uncertainty, depending upon contingencies, Is not the same true of every promissory note negotiable by the law merchant? The simplest one in form will carry with it an obligation to pay protest fees and interest in case of dishonor. The protest

fees are contingent upon protest being made, and upon the number of indorsers notified. The interest payable is contingent upon time. Bills of exchange, which, in the matter of certainty of amount, stand upon the precise footing of promissory notes, carry with them an implied contract in case of dishonor to pay notarial expenses and interest (and in case of foreign bills payable abroad), re-exchange and expenses besides. That makers of promissory notes may make stipulations affecting their liability and the remedies to be taken against them in case of dishonor, and after maturity, without destroying the negotiable character of the notes, seems to be well settled. A note in the usual form to which is added, 'Waiving right of appeal and of all valuation and exemption law,' is negotiable. *Zimmerman v. Anderson*, 57 Penn. St. 421; *Wollen v. Ulrich*, 64 Ind. 120. So is one with a power of attorney to confess judgment attached. *Osborn v. Hawley*, 19 Ohio, 130; *Cushman v. Welsh*, 19 Ohio St. 536; *Kirk v. Ins. Co.*, 39 Wis. 138; S. C. 20 Am. Rep. 39. So is one directing the appropriation of the proceeds of the note. *Treat v. Cooper*, 22 Me. 203. Likewise a stipulation may be made that no interest shall accrue prior to a certain date. *Helmer v. Krolick*, 36 Mich. 371. Or, if not paid at maturity, the note shall bear interest at an increased rate. *Houghton v. Francis*, 29 Ill. 244; *Towne v. Rice*, 122 Mass. 67; *Parker v. Plymell*, 23 Kans. 402. * * * In all the foregoing instances of notes and bills of exchange, the amount to be paid at maturity was certain; the collateral or additional contract, embodied in the instrument or supplied by the law, relating solely to the amount promised to be paid in the contingency of dishonor, and expenses thereby incurred. Now if negotiable instruments may carry with them, either as 'ballast' or 'baggage,' a collateral contract in case of dishonor to pay reduced or increased interest, to waive delays and homestead exemptions, to confess judgment, to appropriate the proceeds, to sell collateral security, to pay (in cases of bills) re-exchange and expenses, all without losing their negotiable character, there is no principle founded in reason which shall declare a promissory note to be not negotiable because it contains a collateral contract that in case of dishonor the maker shall pay the expenses directly resulting from his own miscarriage or default. It seems to me, both on principle and authority, we properly ruled on the trial of this case.

that the note sued on was negotiable. If the note was negotiable, the plaintiffs, who are innocent holders, may enforce the stipulation for attorney's fees against the maker. *Hubbard v. Harrison*, 38 Ind. 323; *British Bank v. Ellis*, 6 Sawy. 97; Dan. Neg. Inst. § 62; and see *Miner v. Bank*, 53 Tex. 559." See ante, 447; *Johnston v. Speer*, 92 Penn. St. 227; S. C. 38 Am. Rep. 675, and note 677. —*Albany L. J.*

A STRIKING exemplification of the danger of "helping one's self" in a shop, and of trying to get more than one's money worth, is shown in *Gwynn v. Duffield*, Supreme Court of Iowa, April, 1883, 15 Rep. 786. This was an action of negligence against an apothecary. The plaintiff ordered some extract of dandelion, and the apothecary by mistake served him out of the belladonna jar, and was doing the package up. Then, as the court state, "the plaintiff went to the jar containing belladonna and took out, on the point of his knife, what he thought was a dose of the extract of dandelion, and called the attention of one of the defendants to it, and asked if that was a proper dose; and the defendant, supposing that it was the extract of dandelion, told the plaintiff that the amount on his knife was a proper dose, and therefore the plaintiff took it. The jar, it appears, was properly labelled, and the plaintiff's negligence, if any, consisted in not discovering that the jar contained belladonna. There is no pretence that he could not read. The only excuse for him was, so far as we can discover, that the defendant, whom he consulted in regard to the size of the dose, had just made the same mistake. He had just taken from that jar, as the plaintiff had seen, a portion of its contents to fill an order for the extract of dandelion, given by the plaintiff, and was doing up the package when the plaintiff proceeded to help himself to a dose from the jar as above set forth. There is not the slightest evidence that the defendant discovered the plaintiff's danger." The court charged the ordinary doctrine of contributory negligence, but added the exception that the plaintiff might recover, in spite of his own contributory negligence, if the defendant, after seeing the danger of injury, did not use ordinary care to avert it. The court said: "The jury then should have been instructed without qualification that if the plaintiff was guilty of negligence contributing to the injury he cannot recover."—*Albany L. J.*

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

MASTER'S OFFICE.

DARLING V. DARLING.

Production of documents—Delivery out after inspection.

The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case, which are in the possession or control of the opposite party; and when that object is accomplished the documents will go back to the custody of the party producing them.

The Court will not impound documents which appear to have been tampered with, but will retain them for a reasonable time for inspection, or to allow criminal proceedings to be taken in respect of them.

The Master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the party producing to take them back.

(Toronto—Mr. HODGINS, Q.C.)

This was an application by the defendant for the delivery out to him of certain account books brought into the Master's office in March, 1882, pursuant to an order for production.

Bain, for the defendant, filed an affidavit showing that the books were material to the defendant's business in Montreal.

W. Barwick, contra, objected on the grounds that the defendant intended to remove the books to Montreal, out of the jurisdiction of the Court, and that the books showed that they had been tampered with—leaves having been torn out and balances altered.

THE MASTER IN ORDINARY—The jurisdiction of the Court in ordering the production of documents evidently comes from the *actiones ad exhibendum* of the Roman Law, which enabled the owner of a thing in the possession of another to compel its production or exhibition so as to enable the owner to establish his claim to it: Sanders' Justinian, 191. This Court by its order enables either party to an action to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant

Master's Office.] RE MIDLAND RY. AND TOWNSHIPS OF UXBRIDGE AND THORAH.

[Ass. App.]

to the case, which are in the possession or power of the opposite party; that is a discovery in aid or for the purposes of proof, so far as relates to the party's case.

When the object of the production is accomplished it may be reasonably inferred that the Court will not constitute itself the custodian of such documents, or impound them in the interest of either party; and the cases bear out this view.

In *Small v. Attwood*, 1 Y. & C. Ex. 37, the Court held that when books, etc., were brought into Court for the inspection and examination of the plaintiff, that object having been answered the books should go back to the custody of the party producing them; and that if subsequently required for the purposes of any inquiries directed by the decree, the Master would use his discretion in requiring them to be produced in his office.

But the plaintiffs ask that, in consequence of the way in which the books have been tampered with, they should be impounded until the inquiry is terminated. *Beckford v. Wildman*, 16 Ves. 483, is against this proposition. In that case a bill was filed to set aside two conveyances of the Quebec Plantations, in Jamaica, and a motion was made that these instruments should be deposited with the Master for safe custody, on the ground that there were material variations between them. Lord Eldon refused the motion, stating that where the object of the suit was to destroy the deed, the plaintiff had a right to have it produced, and left in the hands of the Clerk of the Court, for the usual purposes of inspection, &c.; that, although the variations complained of did exist, he would not order the deeds to be deposited or impounded for safe keeping, no case of danger that they would not be produced at the hearing, having been established.

In *Walker v. Cooke*, 3 Y. & C. Ex. 277, a motion was made to re-deliver to the defendant certain bills of exchange and promissory notes which had been deposited by him in Court under the usual order. The motion was opposed on the ground that the plaintiff was advised to take criminal proceedings against the defendant, in respect of such bills and notes—the plaintiff denying the genuineness of his apparent endorsement to one of the notes. Alderson, B., said he would make no order then, but directed that the bills and notes should remain a reason-

able time in Court, to see whether the plaintiff would take the intended criminal proceedings against the defendant.

As to the books being taken out of the jurisdiction, *Gabbett v. Cavendish*, 3 Swans. 267, may be referred to, where, on proof that certain books in Dublin "were of consequence to the business carried on there," Eyre, C. B., excused their non-production in London, and made an order that the defendant should deliver a schedule upon oath of the papers in Dublin, and that the plaintiff should have copies of all such as he pleased. It is proved here that the books now asked for are material to the defendant's business in Montreal.

The case of *Sidden v. Siddiard*, 1 Sim. 388, decides what is the jurisdiction of the Master in similar cases. In that case Sir Anthony Hart, V.C., after consultation with Lord Lyndhurst, L.C., and Sir John Leach, M.R., held, that under the usual order for the production of documents in the Master's office, the Master was at liberty to direct either party to leave them in his office so long as he thought any useful purpose might be answered by their remaining there, and then to allow the party producing to take them back. See, also, *Hanna v. Dunn*, 6 Madd. 340 and Cons. Ch. Orders 222.

In *Ex parte Clarke*, Jac. 389, the documents produced in the Master's office were directed to be retained until a proper inspection of them was obtained, and six weeks was allowed for that purpose. Here the books have been in the office for about a year; but in case the plaintiffs desire a further inspection they may be detained in the office for a week and then delivered out to the defendant.

ASSESSMENT APPEALS, COUNTY OF ONTARIO.

RE MIDLAND RAILWAY AND TOWNSHIPS OF UXBRIDGE AND THORAH.

Assessment of railways—Average value of land in locality—Fences.

Held, that the average value per acre of the lots or farms through which the railway passes must be taken as the value per acre of the roadway occupied by the company.

Also, that the value of the buildings on the farms should not be excluded from such average value.

Also, that the railway fences are part of the superstructure, and, as such, exempt from assessment.

[Whitby, July 26th, 1883.]

Ass. App.]

MCCREA V. EASTON.

[Div. Ct.]

The Midland Railway Company appealed on various grounds against their assessment. In all their appeals they contended (1) that the value of the buildings upon the lands in the locality should be deducted from the total value before ascertaining the average value of the lands in the locality; (2) that the "lands in the locality" means the lands through which the railway actually passes; and (3) that the fences are part of the superstructure, and, as such, exempt.

Biggar, for the company.

J. E. Farewell, for the township of Thorah.

E. C. Campbell, for the township of Uxbridge.

DARTNELL, J.J.—Many such appeals as these in question must have come before the County Judges, but, as far as I am aware, there are but few reported cases, and these are all noted in a judgment of His Honor Judge Daniel in *Re The Canadian Pacific Ry.*, 18 C. L. J. 285.

I am asked to interpret the meaning of the words, "average value of land in the locality." I think the safest and best course, as well as the fairest for both Municipality and Company, will be to hold that these lands are those through which the Railway *actually* passes, and I will take the average value of these lands, "as rated on the assessment roll of the previous year," as forming a basis upon which the value of the roadway shall be determined. I cannot accede to the contention of the Company that the value of the buildings upon these lands is to be deducted from the assessed value as appears upon the roll. The words of the Act are, "as rated upon the Assessment Roll of the previous year." Now, there is no separate assessment of the lands, apart from the buildings, but both are assessed together as "lands." Without the material at hand upon the face of the Assessment Roll to determine the value of the land apart from the buildings erected thereon, an enquiry on this head in respect of every lot of land through which the Railway passes would be necessary. This would be, if not impracticable, as least interminable. I take it, under the Assessment Act, "land" includes all buildings erected thereon.

In the township of Uxbridge, the roadway, according to my view, is properly assessed, but the Court of Revision have separately assessed the Railway fences at the sum of \$2,884.

The Road-bed of the Railway occupies about 80 acres of land in the township. The Court of Revision assumes that a *farm* of this size would have on the average about 800 or 900 rods of fencing, whereas the Company have erected about 5,000 rods, and they are assessed for the excess.

I think they are improperly assessed, and that the fences are as much part of the superstructure as is the iron, ties, ballast, &c., which have been held to be exempt. The Company is bound to maintain these fences for all time to come. Unlike other adjoining owners, the Company is solely bound to erect and maintain their fences, and the owners of the adjacent lands have no interest therein, or any obligations in respect of their maintenance and repair. Being of opinion that the Railway is not assessable in respect of their fences. I allow the appeal in respect of the sum they have been assessed therefor.

FIFTH DIVISION COURT, LEEDS AND GRENVILLE.

MCCREA V. EASTON.

Line Fences Act.

In an appeal from the award of fence viewers to the County Judge in a case in which part of the land in one county, and the remaining part in another, *Held*, a case not provided for and no jurisdiction.

The facts were as follows:—The land of the appellant, McCrea, was lot 7 in Concession A, of the Township of Montague, in the County of Lanark; and that of the respondent, Easton, was the south-east quarter of lot 8 in the same concession, but was within the limits of the incorporated village of Merrickville, in the County of Grenville, one of the United Counties of Leeds and Grenville. The parties not being agreed as to a fence or fences, the respondent notified appellant that three fence viewers of Merrickville would arbitrate in the premises, and also notified the fence viewers. All parties attended, and an award was made. From such award the appellant appealed to the Judge of the County Court of said United Counties, who appointed the 28th of September, at Merrickville, for the hearing of the appeal; on which day, (day of sitting of Division Court),

Joseph Deacon, of Brockville, appeared for the appellant. The respondent appeared in person.

The appellant put in a copy of the award of the fence viewers, certified by the clerk of the village of Merrickville. Upon looking at it and at the Act, the judge entertained grave doubts as to his jurisdiction, and reserved judgment, to be given at the office of the clerk of the Division Court.

MCDONALD, Co. J.—This is an appeal to me, as Judge of the County Court of the United Counties of Leeds and Grenville, from an award of three fence-viewers of the village of Merrickville, in said United Counties. The 3rd section of the Line Fences Act provides, in case of dispute, that there shall be arbitration by "three fence-viewers of the locality." The 7th section provides that "the award shall be deposited in the office of the Clerk of the Council of the Municipality in which the lands are situate." The 11th section provides for appeal to "the Judge of the County Court of the County in which the lands are situate," and for the delivery of a copy of the notice of intention to appeal "to the Clerk of the Division Court of the division in which the land lies." Now in the case in question it is impossible that all these provisions can be complied with. For although it should be urged that the word "locality" in section 3 is wide enough to cover the surrounding country, without regard to municipal divisions, and that the provisions of the 7th section would be complied with by having the award executed in duplicate, and by depositing one of such duplicates in the office of the Clerk of *each* Municipality in which a portion of the lands is situate, I think that such a construction would, as to both the 3rd and 7th sections, be a very strained one, and quite at variance with the reading of the Act as a whole. And, at any rate, there is not any mode that I can perceive of getting around or surmounting the difficulties presented by the provisions of the 11th section, as to the Judge to whom the appeal shall be made, and the Division Court Clerk to whom a copy of the notice is to be delivered. The words are "the Judge of the County Court of the County in which the lands are situate," and "the Clerk of the Division Court of the Division in which the land lies." In the case now under consideration the lands are not situate wholly in one County,

and do not lie wholly in one Division, and I must therefore decide, and do decide, that the provisions of the statute as to appeal do not extend to or cover such case, and that I have not jurisdiction to hear and determine the appeal. I presume that the person who drafted the Act had not in his mind a thought of the possibility of such a contingency occurring, and may mention, in this connection, that Mr. Edmund Reynolds (who has appeared under instructions from Respondent) has drawn my attention to the fact that, by the legislation contained in chapter 12 of the statutes of 1878 (O), provision has been made to meet such a case as this, when the question arises under the Act as to ditching water-courses. I presume if the attention of the Legislature is called to the matter similar provision will be made for a like state of facts under the Lines Fences Act.

It is, in my opinion, a debatable point, whether I have jurisdiction over costs. It is possible that marginal rule 489 of the Judicature Act confers such jurisdiction, but even if it does, I do not think this a case in which costs should be allowed, and I make no order in reference to them.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

[Sept. 18.]

WOLVERTON V. TOWNSHIPS OF NORTH AND SOUTH GRIMSBY.

High School District—By-Laws annexing parts of two Municipalities—Repeal.

In 1879, the Township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for High School purposes. In 1881, the same county similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vict., cap. 33, O., the township was divided into two townships of North and South Grimsby. In 1882, the the council of the township passed a by-law on the petition of less than two-thirds of the ratepayers repealing the two former by-laws.

Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R.S.O., cap. 205, sec. 30, as amended by 42 Vict., cap. 34, sec. 32, which could not be rescinded by one of the municipalities without the concurrence of the other; and therefore, that the repealing by-laws should be passed only upon the petition of two-thirds of the ratepayers.

Aylesworth, for applicant.

Muir, contra.

[Sept. 28.]

IN RE CAMERON, (a Solicitor.)

Solicitor's undertaking to produce client—Failure to produce—Liability of solicitor.

It was alleged that a solicitor, whose client had been summoned to be examined as a judgment debtor, in a Division Court action, gave a verbal undertaking that if the summons was enlarged the judgment debtor would appear to be examined at the next court. During the enlargement the judgment debtor disposed of his property and left this country, and a motion was made to compel the solicitor to pay the debt and costs.

Held, that the undertaking did not impose on the solicitor any liability other than the duty to produce his client at the Court on the day of its sittings.

Semble, that the solicitor's pecuniary liability on his undertaking would amount only to the expense which the creditor might be put to of attending at the time and place of the adjournment, if the debtor failed to appear, though other damage might possibly be proved. The undertaking having been denied by the solicitor for the debtor, the notice was dismissed.

Aylesworth, for applicant.

Cattanach, contra.

CHANCERY DIVISION.

Boyd, C.]

[Sept. 29.]

MUNDELL V. TINKISS.

Absolute deed—Parol evidence—Rectification—Fraudulent purpose—Mortgage or no mortgage.

Where the plaintiff brought an action to redeem a certain property conveyed by him by

a deed absolute in form; and it appeared that the deed in question, which he now sought to cut down to a mortgage, had indeed been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the claims of an apprehended creditor:

Held, under these circumstances evidence was not admissible to rectify the form of the instrument, for, as said by Esten, V.C., in *Phelan v. Fraser*, 6 Gr. 337, this Court never assists a person who has placed his property in the name of another in order to defraud his creditor; nor did it signify whether any creditor had been actually defeated or delayed, for the language of the M. R. in *Symes v. Hughes*, L. R. 9 Eq. 479, is too broad when he says, "if the purpose for which the assignment was given is not carried into execution, and nothing is done under it, the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it." The decided weight of authority, and authorities in our own courts, is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of court or by the aid of the court.

Where one has executed an absolute deed, as, in reality, security for payment of a debt only, and has, after the execution thereof, continued in possession of the land conveyed through tenants, that fact would be enough in ordinary circumstances to justify the reception of evidence for the purpose of rectifying the form of the instrument.

Boyd, C.]

[Sept. 29.]

ONTARIO BANK V. LAMONT.

Assignment in trust for creditors—Impeaching such assignment—Fraudulent preference—Discretion of assignee in trust.

Where it was sought to set aside a certain assignment of real and personal property made by a debtor to a trustee for creditors, and it appeared that the assignor had, before the execution of it, satisfied some of his creditors in full

by transferring his goods to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a release of the debtor in any manner :

Held, the instrument could not be set aside, and the action must be dismissed with costs.

A distinction drawn between such a case as this and the American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors, by an instrument which provides for his discharge ; that, in fact, he cannot be allowed to coerce his creditors into an acceptance of the fragments of his estate as a satisfaction in full of their claims while he has disposed of other parts of his property to pay preferred creditors in full. Here the only effect of the deed was to vest the estate in the hands of a trustee for equal distribution, so that the whole might not be swept off upon a forced sale at the instance of an execution creditor.

The duties of assignees under such instruments as the one in question here are analogous to those of executors and trustees administering estates, and the Court will consider that a year is a proper time within which the sale of the property assigned, (when such sale is left by the instrument in the discretion of the assignee), is to be made. If not made within that time the *onus* will be cast on the assignee of satisfying the court of his *bona fides* in seeking further delay. Execution creditors cannot sell the land for a year, and a delay of that time cannot be said to prejudice them, and render such an assignment on that ground impeachable under the statutes of Elizabeth.

J. Bethune, Q.C., for the plaintiff.

Boyd, C.] [Oct. 10.
MERCHANTS' BANK OF CANADA v. HANCOCK
ET AL.

Company—Raising Money on Warehouse Receipts—Ultra Vires—Locus standi of execution creditors—Directors.

Interpleader issue between the Merchants' Bank of Canada and certain execution creditors. The former claimed that they were entitled to

the property in question, which had been taken in execution, as security for certain advances made by them to the Hamilton Knitting Company, by virtue of certain warehouse receipts covering the said property, and delivered to and deposited with them by the said Hamilton Knitting Company, as security for such advances :

Held, the Hamilton Knitting Company could not have resumed possession of the goods without satisfying the bank's lien, and execution creditors had no higher rights as to property seized in execution than the original debtor. For, under the general act applicable to the Company, R.S.O. c. 150. (see secs 14, 28, 30, subs. 2,) the Company was enabled so to pass the property in the goods to the Bank, as security for advances made, and even if a by-law were, strictly speaking, requisite in such a case, yet, where no complaint had been made by the Company, or any of its shareholders, because of any irregularity or informality in what was done, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense,

But, *semble*, apart from this, the depositing of goods in a warehouse, and the raising of money on the security thereof, seemed upon the evidence to have been an important constituent for the successful prosecution of the Company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing in this case.

Boyd, C.] [Oct. 10.
CULHANE v. STUART.

Following trust money—Earmark—Holder for value.

Where C., an insolvent, had assigned all his assets and stock-in-trade to S., as trustee for creditors, and the plaintiff claimed to be entitled to a specific lien upon the property so assigned to the extent of certain trust moneys, which he alleged had come into C.'s hands as trustee and executor under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but there did not appear any sort of identification or connection between the trust money thus used in pay-

Div. Ct.]

NOTES OF CANADIAN CASES.—BOOK REVIEW.

ing C.'s debts, and the proceeds of his stock-in-trade now in the hands of S., the assignee :

Held, the plaintiff was only entitled to a dividend with the other creditors on the full amount down to the assignment ; for the trust fund, having been dissipated by the using of it to pay debts, could not be followed after that into the hands of holders of value, such as were the other trade creditors, though the plaintiff was entitled to the full amount of the trust fund, with interest, as against the defendant C.

The law is still as laid down by Lord Ellenborough in *Taylor v. Plumer*, 3 M. & S. 562, that the product of, or substitute for, the original thing still follows the nature of the thing itself as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail.

DIVISION COURTS.

THIRD DIVISION COURT, LEEDS AND
GRENVILLE.

AWBERRY V. MCLEAN.

Wages—Counter-claim—Damages.

Action for wages. Defendant filed a notice disputing the claim, and put in a counter-claim for damages for breach of contract, by reason of plaintiff's leaving his employment. See *Judicature Act*, ss. 77, 80, Rule 127, sec. 3.

MCDONALD, Co. J., held that the defendant had a right to put in the counter-claim.

Judgment in the case was for defendant, with costs.

ASSESSMENT CASES.

COUNTY OF ONTARIO.

RE PHILP V. MUNICIPALITY OF REACH.

Assessment—Superannuated minister—Exemption—R. S. O. c. 180, sec. 6, ss. 23.

DARTNELL, J.J.—The dwelling house of a superannuated minister of the Methodist Church is exempt from taxation so long as he continues in actual connection with his church, and does duty as such minister, notwithstanding he may not be in charge of a congregation or parish.

The word "church" does not here mean a parish or congregation, but a "religious body."

Re Stewart and Kincardine, 18 C.L.J. 322 ; and *Re O'Connor and Barrie*, 13 C.L.J. 273, referred to and discussed.

BOOK REVIEW.

PRINCIPLES OF CONVEYANCING. An Elementary work, for the use of Students. By Henry C. Deane, Lincoln's Inn, Barrister-at-law. Second Edition. London : Stevens & Haynes, Law Publishers, 1883.

The first Edition came out in 1874,—the book rapidly obtained the favour of the profession, and was looked upon as remarkably clear in arrangement, very pleasantly written, giving information on a dry subject in a manner calculated as far as possible to win the attention of students. Williams on Real Property, will remain the book for students for many a long year to come ; but Mr. Deane's work has many advantages, is fuller and useful to others besides students. Part I discusses corporeal hereditaments, their nature and incidents. Part II is devoted to conveyancing, and is of especial value as a book of reference in this country. We can confidently recommend this excellent work to our readers if they have not already possessed a copy of the first edition.

THE CONSOLIDATED MUNICIPAL ACT, 1883, with an Index, by G. Bell, Esq., Barrister.

It is a pity that the statutes are not always provided with such good indices as that here made by Mr. Bell. This edition of the Act, has had a large sale to the profession as well as, of course, amongst the Municipal officers.

LITTELL'S LIVING AGE. The numbers of *The Living Age* for September 15th and 22nd contain France and England in Egypt and France and Syria, *Fortnightly* ; The Locust War in Cyprus, *Nineteenth Century* ; Across the Plains, *Longman's* ; King Mtesa, and The Belka Arabs, *Blackwood* ; Two Turkish Islands To-day, *Macmillan* ; Moruca ; or a Few Days among the Indians, *Month* ; Earth Pulsations, and Winter Life at Fort Rae, *Nature* ; Unclaimed Money, and The Southampton Artesian Well, *Chambers' Journal* ; The Pathetic Element in Literature, The Closing of the Scottish Highlands, And a Summer Day's Journey, *Spectator* ; with "Master Tommy's Experiment," "Town Mouse and Country Mouse," and instalments of "Along the Silver Streak," and poetry.

This is a most useful publication, and in none can such an amount of good and varied reading be obtained at the price.—\$8.00 per annum.

For \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely :—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewar, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy, Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesley Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesly Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely :—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows:—Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From	{ Arithmetic.
1883	{ Euclid, Bb. I., II., and III.
to	{ English Grammar and Composition.
1885.	{ English History Queen Anne to George III.
	{ Modern Geography, N. America and Europe.
	{ Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. VI.
1883.	{ Cæsar, Bellum Britannicum.
	{ Cicero, Pro Archia.
	{ Virgil, Æneid, B. V., vv. 1-361.
	{ Ovid, Heroides, Epistles, V. XIII.
	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. V., vv. 1-361.
1884.	{ Ovid, Fasti, B. I., vv. 1-300.
	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. IV.
	{ Xenophon, Anabasis, B. V.
	{ Homer, Iliad, B. IV.
1885.	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. I., vv. 1-304.
	{ Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Cantos V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

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No. 18.

DIARY FOR NOVEMBER.

1. Thurs... All Saints' Day.
3. Sat.... Draper, C. J., died, 1877.
4. Sun... *Twenty-fourth Sunday after Trinity.*
5. Mon... Sir J. Colborne, Lieut.-Governor U.C., 1838.
6. Tues... First Intermediate Examination.
7. Wed.... First Intermediate Examination.
8. Thurs... Second Intermediate Examination.
9. Fri.... Prince of Wales born, 1841. Second Intermediate Examination.
11. Sun... *Twenty-fifth Sunday after Trinity.*
13. Tues... Ct. of App. sitt. begin. Examination for Certificate of Fitness.
14. Wed.... Examination for Call.

TORONTO, NOV. 1, 1883.

The English Married Women's Property Act, 1882, has been decided by Mr. Justice Chitty, not only to have secured to married women separate rights of property, but, also, to have enlarged their capacity for acquiring property. Formerly the rule was that if a gift were made to a husband and wife and a third person, the property was divisible into moieties, the husband and wife taking only half, and the third person the other half of the subject of the gift. This rule was based on the principle that "the husband and wife are all one person in law," Co. Lit. p. 187. The act, however, appears to have effectually displaced this old time theory; and a husband and wife are, in England, no longer one, but two, as regards right of property; and according to Mr. Justice Chitty's decision in *Re March Manden v. Harris*, 49 L. T. N. S. 168, under such a gift the husband and wife now take one third each, and the third person the other third. It does not appear that the reasoning adopted by Mr. Justice Chitty in coming to this conclusion can be made applicable to the construction of the Married Women's Property Act, of this Province, the phraseology of which does not appear to be

as wide as that of the English Act. By the English Act a married woman is declared to be capable of "acquiring, holding and disposing by will, or otherwise, of any real or personal property, as her separate property, in the same manner as if she were a *feme sole* without the intervention of any trustee." A comparison of these words with those used in the R. S. O. c. 125, will show that they give much more ample rights. The words in the Revised Statutes are "may have, hold and enjoy all her real estate, whether belonging to her before marriage, or acquired by her by inheritance, devise or gift, &c., or in any other way after marriage, free, &c., in as full and ample a manner as if she continued *sole* and unmarried," s. 3; see also ss. 2, 4 and 5. None of these sections say in terms that she may acquire property as a *feme sole*, but simply in effect provide that having acquired it as a married woman may acquire property, she may hold and enjoy it as a *feme sole*.

REDEMPTION.

A case of some importance, regarding the law of mortgages, was recently disposed of by the Divisional Court of the Chancery Division. We refer to *Martin v. Miles*, ante p. 316. The action was one for redemption. It appears that the defendant, Miles, was the mortgagee of one Cameron, against whom a judgment and final order of foreclosure had been obtained. Prior to the foreclosure, however, Cameron had leased the mortgaged property to Martin, who was not made a party to the foreclosure proceedings, and who, as such lessee, now brought the present action to redeem the mortgage, notwithstanding

REDEMPTION.

ing the foreclosure of his lessor—the mortgagor. The defendant offered to confirm the plaintiff's lease, and contended that under the circumstances the plaintiff could not insist on the right to redeem. The case was tried before Wilson, C. J. C. P., who gave effect to the defendant's contention, considering that the equity of redemption was an equitable right which the court was at liberty to enforce, or refuse to enforce, according to the circumstances of each case. The Divisional Court, however, were unanimously of opinion that the judgment of Wilson, C. J., should be reversed, Boyd, C., laying it down that "an equity of redemption is an estate in the land, and in all cases where the right to redeem has not been barred by the Statute of Limitations, it exists as a right and an estate over which the court has no discretionary power."

No doubt there is very high authority for the law as thus laid down in Lord Hardwicke's judgment in *Casborne v. Scarfe*, 1 Atk. 603, which may be well considered the leading case in favor of the theory that the equity of redemption is "an estate in the land" and not a mere equitable right. There are, however, other authorities to be found both in the English courts and our own, some of quite recent date, in which the view is maintained that the equity of redemption is an equitable right only, and not an estate in its proper legal acceptation, although confessedly subject to many of the incidents of an estate. For instance, Sir John Leach, in *Lloyd v. Lander*, 5 Mad. 290, when discussing whether the equity of a redemption of a bankrupt mortgagor could vest in his assignees without an actual conveyance, said, "after a mortgage in fee no estate is in form left in the bankrupt. The equity of redemption is not an estate, but an interest, and may well be considered as substantially vested in the assignees before a bargain and sale. Whatever therefore might be the case with respect to real estate generally, it would be difficult to establish that it is necessary to give the as-

signee a title to redeem against the mortgagee, that there should be a bargain and sale of the equity of redemption." And again, Sir James Bacon, V. C., in *Paget v. Ede*, 18 L. R. Eq. 125, speaking of an equity of redemption, says: "It is said that is an estate. But it is by a figure of speech only that it can be called an estate. It may be in some instances that a husband may have a title by courtesy, and that gavelkind and borough English may apply to it. All these are necessary consequences of the law which recognises the interest of a mortgagor in his equity of redemption, but they do not alter the nature of the interest or create an estate; and in my opinion it is a misapplication of terms to call an equity of redemption an estate in the proper, technical, legal sense. That it is a right is beyond all doubt." In the Court of Chancery, of this Province, the court has also acted on this view, notably in the well-known case of *Skae v. Chapman*, 21 Gr. 534; and also in *Kay v. Wilson*, 24 Gr. 212. In these cases treating the equity of redemption as an equitable right over which the court might exercise a discretionary power redemption was refused, although the claim of the plaintiff in neither case appears to have been barred under the Statute of Limitations.

In the former case Spragge, C., quoted with approval from Powell on Mortgages, where it is said that an "equity of redemption is defined by Sir Matthew Hale to be an equitable right inherent in the land," and again where he says: "But although the power of redemption be an ancient right which the mortgagor and all claiming under him, whether by voluntary conveyance or otherwise, are entitled unto, yet being a right originating in, and in fact created by, a court of equity, it is made subservient to their rules," and treating the case as one to be governed by the same rules as are applicable to any other case where the court is asked to relieve against a forfeiture, he refused redemption, not because the plaintiff's right was barred by the Statute of Limitations, but be-

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cause he thought the countervailing equities would render it inequitable to grant the relief under the circumstances of that case.

But whether the mortgagor's interest is to be considered as "an estate," or not, it seems clearly established that it is an estate of a somewhat anomalous character, and may be released and surrendered by acts of the party entitled thereto, indicating a clear intention of abandoning the right of redemption, without any formal release or conveyance: See *Smyth v. Simpson*, 7 Moo. P. C. 223, S. C. 5, Gr. 104; *Holmes v. Matthews*. *Ib.* 108; *Roach v. Lundy*, 19 Gr. 243.

It seems somewhat difficult to reconcile the dictum of Boyd, C., in *Martin v. Miles*, which we have quoted, with the principle on which *Skae v. Chapman* and *Kay v. Wilson* were decided. If the equity of redemption be an estate, and not a mere equitable right, the enforcement of which is subject to the discretion of the court, it is difficult to see how redemption can properly be refused in any case on the mere ground of laches, where the delay has not exceeded the period allowed for bringing an action by the Statute of Limitations. One of two conclusions seems inevitable, either that the dictum of Boyd, C., is too wide, or the cases of *Skae v. Chapman* and *Kay v. Wilson* cannot have been well decided.

The principle on which *Faulds v. Harper*, 2 O.R. 405, proceeded, received a further confirmation in *Martin v. Miles*, and the doctrine was reaffirmed that any person having any interest in the equity of redemption is entitled to redeem the whole mortgaged estate, and his right of redemption is not limited to the redemption of the particular estate or interest he may have in the equity of redemption. In *Faulds v. Harper* the equity of redemption was vested in several tenants in common, some of whom were, and some of whom were not, barred by the Statute of Limitations, and it was held that the mortgagee could not claim that as to the shares of those who were barred the estate was irredeemable; and now

in *Martin v. Miles* it has been determined that the foreclosure of a part owner of the equity of redemption does not render the interest foreclosed irredeemable as against a part owner who is not foreclosed, but that the latter, if entitled to redeem at all, is entitled to redeem the whole mortgaged estate, absolutely, notwithstanding the foreclosure. *Faulds v. Harper* is, we believe, now standing for judgment in appeal; but the principle which the Divisional Court laid down in that case we think will be found to be the correct one.

There is one practical lesson to be learned from the case of *Martin v. Miles*, which practitioners will do well not to overlook, and that is the necessity of joining, as defendants in an action for foreclosure, the lessees of the mortgagor, and in fact all persons claiming under him, however small their interest may be; for so long as any interest exists unforeclosed, the parties entitled thereto are entitled to insist on redeeming the mortgagee. In the case of *Martin v. Miles* we understand it was alleged that the mortgaged property had greatly increased in value since the foreclosure of the mortgagor, and hence the desire of the lessee to redeem.

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It is at all times a most delicate task to write even a brief memoir of a public man who is still living. Much that, in justice, ought to be said in praise of your subject will sound like adulation; while to criticize with freedom will expose you to the imputation of unpleasant fault-finding. It is still more difficult, perhaps, to review the career of a man, eminent as a judge, who has retired full of honors from the service of his country, after discharging judicial duties for a period exceeding 40 years, especially when one feels a warm personal regard for the man. The length of this term of service is almost un-

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paralleled in the judicial annals of the Dominion, and yet Judge Gowan has the satisfaction of retiring from an onerous post, with the knowledge, that though physically he feels the inroad made upon his health by his long judicial labors, yet that he retains in an unusual degree his faculties unimpaired, and is enabled by the blessing of Providence to enjoy his well-earned rest with the keen zest that arises from the possession of a vigorous intellect and a cultivated and well-stored mind. This merited enjoyment of ease and comfort will be materially enhanced by the feeling that the greater part of his past life has been usefully and profitably spent in the service of his country.

Appointed to the County Court of the County of Simcoe, in 1843, at the early age of 25, Judge Gowan has for over two score years discharged his duties as a County Judge, and during that period has probably done as much as, if not more than any living politician or judge, towards improving, cementing together, and building up our local Courts' judicial system to the perfection it has now attained. Developing before his appointment to the bench a singular readiness and skill as a legal draftsman, this rare ability has been constantly drawn upon by successive Governments, and the imprint of his legal capacity, his practical knowledge of the requirements of the country, and the marks of his patient industry can be traced in numerous statutes passed from time to time, and particularly in the various consolidations of the statutes which periodically the Legislature has been compelled to make in order to compress, prune, and simplify our somewhat luxuriant and redundant law-making. Judge Gowan, in 1853, was one of the five Judges appointed to frame rules regulating the procedure in the Division Courts under the act of that year. In the year 1857 he was associated with the Judges of the Superior Courts of Common Law, to frame a tariff of fees for those Courts. He was also associated about the same time with the late Sir J. B.

Macauley, in consolidating the Statutes of Upper Canada and Canada; and likewise with Mr. Justice Burns and Vice-Chancellor Spragge (the present Chief Justice of the Court of Appeal), in framing the rules and orders regulating proceedings in the Probate and Surrogate Courts. In 1869 he was appointed Chairman of the Board of County Judges, which position, we understand, he has been requested by Attorney-General Mowat to retain, notwithstanding his retirement from the County Bench—a graceful, and at the same time merited, acknowledgement of his past valuable services, and one which enables a much-desired bond of connection to be maintained between Judge Gowan and his brethren of the County Bench. In 1870 he was appointed by the Dominion Government one of a committee to consolidate the Criminal Laws, and about the same time received an appointment from the Ontario Government as one of five commissioners, to consider the feasibility of a fusion of the Courts of Law and Equity, a result since consummated by the Judicature Act. In 1873 he was nominated as one of the Royal Commissioners to enquire into the Pacific Railway scandal; his duties connected with this enquiry he discharged with his usual fidelity, fairness and conspicuous impartiality; and notwithstanding the excited political feeling of the period he seems to have escaped, with a slight sprinkling, the shower of abuse which was so indiscriminately poured (whether properly or not we offer no opinion) upon the party then in power, and upon all connected with them officially or otherwise. In 1874 Judge Gowan was appointed by the Ontario Government one of the Commissioners for the revision, consolidation and classification of the Public General Statutes relating to the Province—a work which was finally completed, much to the satisfaction of the public and the profession in 1877.

The foregoing is but a brief *resumé* of some of the more important judicial and public work in which Judge Gowan has taken a

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prominent part during the past 30 years of his life, but it by no means professes to be an accurate record of his manifold services to the profession and the state. It is well known that many important Acts of Parliament, and many valuable amendments of existing statutes have originated in his fertile brain, and any suggestion coming from this eminent Judge, with his known experience and ripe judgment, it may well be believed, was eagerly and gladly made use of by the officers of the Crown for the time being, and speedily these suggestions would be found reflected in the Statute Book.

Towards the organization and practical working out of our somewhat complicated municipal system, Judge Gowan has contributed more than perhaps any other one individual. Living himself after his appointment in a new District—brought into daily contact with the immigrant and the old settler, forced to hold his first Division Courts in localities to which for a time the only means of access would be a bridle path, and the only means of locomotion a saddle-horse or one's own stout legs—he was brought face to face with the wants and peculiar requirements of settlements hewn out of the primeval forest, and the learned judge thus acquired a practical experience which was open to few. This special knowledge, added to his well-known legal attainments, and the confidence which was felt in his judgment and knowledge in high quarters, gave him the opportunity to mould much needful and practical legislation—legislation which otherwise would have been largely theoretical and of questionable value. In all such matters Judge Gowan did not confine himself solely to the limited sphere of his local judicial duties, but with pen and voice brought under public notice any notable abuse, or suggested some sensible amendment of the existing law, which would bring order out of chaos, and tend to reduce the constant friction which is an incident to all newly devised systems no matter how carefully framed. Through such labors as

his—and the labors of many others, too, who are entitled to be credited with efforts in the same direction—we have perfected a most flexible and workable system of local self-government, which, while a boon to the various local communities, is at the same time a monument more enduring than brass of the untiring energy and patriotism of men like the late Judge of the Judicial District of Simcoe.

Possessed of such qualities of mind and temperament as we have depicted, so singularly well adapted for judicial work, and judicial distinction, it may be a matter of some wonder why Judge Gowan has not many years since been translated to a larger arena and found a place upon the Superior Court Bench. We believe we are guilty of no impropriety in stating that such preferment has on more than one occasion been within his reach. The learned Judge has, however, always declined any such promotion. A certain natural tenderness of heart, notwithstanding his firmness of character and admirable judicial temper, has prevented him from accepting so responsible a position, since it would involve the necessity, in the higher place, of dealing with capital criminal offences, a duty from the performance of which his sensitive nature recoiled. Had he seen his way clear to accept promotion, his record would undoubtedly have been a fitting sequence to his brilliant career upon the County Court Bench. As a highly conscientious man, Judge Gowan no doubt felt that he was fitted for the position he found himself in, and that it was in his power, possibly, to do more for the advancement and improvement of our legal and municipal system as a County Court Judge, than he would be able to do if he occupied the higher place. The country, by this decision, though it lost the services of an able jurist in the Superior Court, gained largely, we venture to say, by his determination to serve her faithfully and well in the County Court.

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Judge Gowan, it is conceded, was first amongst his County Court contemporaries, and his administration of justice in the County of Simcoe, has been a model for judicial imitation in the other Counties of the Province. His paramount influence in inducing order, system and accuracy of detail in the various departments presided over by judicial and municipal officers, within his jurisdiction, is acknowledged by all who have any acquaintance with the County of Simcoe. It is indeed wonderful that one man could do so much, but his heart was in his work and his officers and others caught his reflected energy. Few men could have discharged official duties for so long a period with such fidelity and credit, and to their latest year displayed such untiring activity and such mental vigor; and it is not given to all men to preside in a county for more than 40 years, and call forth such spontaneous and universal expressions of regret as those heard on all sides when Judge Gowan's retirement was announced.

Few of his decisions have been reviewed in the Superior Courts, and we believe throughout the whole of his judicial career but two of those pronounced have been reversed. There is therefore but little material upon which to base an estimate or express an opinion as to the literary style and matter of his written judgments. All of his that we have read, however, are clear in diction, dignified and concise. They are entirely free from any parade of learning or affectation. Two objects seem to absorb the attention of the Judge. 1—Properly to adjust the disputed rights of the parties. 2—To establish a rule by which similar questions may be solved in the future, and if possible to bring each case within the scope of some general principle which he has enunciated and defined, guarding it, however, with proper conditions and exceptions. Without resorting to forced interpretations or fanciful analogies, he seems anxious to support his opinions by legal precedents

which he cites often and with great felicity. The soundness of his judgments and the care with which he prepared his decisions is evidenced by the fact before mentioned, that but two of his judgments appear to have been reversed on appeal. Judge Gowan occupies as strong a position in the hearts of his friends and acquaintances from his high personal character as from his judicial excellence. A kind thoughtfulness for others and a benevolent disposition endear him to the community in which he has heretofore passed his long and useful life. Spotless purity, entire freedom from undue influence, and an earnest desire to do justice have characterized him as a Judge; great force of character combined with cordiality and courtesy of demeanor, and a high consideration for the performance of his duties have distinguished him as a citizen.

We might refer, did space permit, to the many acknowledgments of valuable assistance given by him to many who, as text-writers and annotators, have endeavored from time to time to help their professional brethren in various departments of legal literature; but we cannot conclude this brief and imperfect sketch without an allusion to the fact that Judge Gowan was instrumental in founding the "Upper Canada Law Journal"; that he has ever been to us a devoted friend and a constant and valued counsellor, one whose interest and assistance have on many occasions shielded the venture from the rocks and shoals to which journalism is so constantly exposed. The columns of this Journal have often reflected his opinions on important matters; and if it has been a success, it is largely due to his many wise and pregnant suggestions, and to the deep personal interest he has always manifested in its welfare.

He takes with him into his well-earned retirement the best wishes of a large circle of friends and admirers for his future health and happiness. And we trust that in some way or another the country may still have the benefit of his talents and his ripe experience. His career is a brilliant example to those

RECENT ENGLISH DECISIONS.

who occupy similar positions of trust and dignity—to emulate which will be a duty, but to equal which will indeed be difficult.

We publish in another place the address presented to Judge Gowan by the Bar of his County on the occasion of his retirement, and his reply thereto.

RECENT ENGLISH DECISIONS.

The September number's of the Law Reports comprise 11 Q. B. D. p. 313-485; 8 P. D. p. 149-178; 23 Ch. D. p. 577-689.

BILLS OF LADING DRAWN IN TRIPPLICATE—TENDER OF TWO ONLY—MERCANTILE USAGE BASED ON CREDIT NOT ON DISTRUST.

In the first of these the first case requiring notice is *Sanders Brothers v. Maclean & Co.*, p. 327, which is an interesting decision on bills of lading and mercantile law and usage in connection therewith. The action was brought by the vendors on a contract entered into between them and the defendants for the sale and purchase of cargoes of iron. The contract merely stated that the cargo was to be paid for in London in cash in exchange for bills of lading. Two parts of the bill of lading of the particular cargo in question were tendered to the defendants on August 3rd, 1880, but they rejected those on the ground that it appeared, by the parts of the bill of lading which were presented to them, that the bill of lading had been drawn in three parts, and two only were tendered to them. Thus, in the words of Brett, M. R., the question was whether, "where, by the terms of an ordinary contract of sale relating to goods shipped, payment is to be made against bills of lading, it is a part of that contract that all the existing copies of the bill of lading must be offered in order to entitle the sender of the goods to payment?" The Court of Appeal unanimously decided this question in the negative, and they held that if the purchaser refuses to accept the bill of lading tendered and to pay, he does so at his

own risk as to whether it may turn out to be the fact or not, that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered. As to this, Cotton, L. J., observes, at p. 339:—"Now although undoubtedly if the third part of a bill of lading should be indorsed and parted with to some party before the tender of the first part, such tender would not be a compliance with the contract, because that which would be tendered would not be an effectual bill of lading, yet, in my opinion, if the purchaser chooses to refuse to accept the cargo, because he does not know whether in fact the tender does comply with the terms of the contract, and whether the other part of the bill of lading has been parted with or not, he does so at his peril, and if it should turn out on investigation that in fact what was tendered to him was an effectual bill of lading, effectual to pass the property in the cargo, then he broke his contract by not paying the money, and by refusing to accept the cargo when such effectual bill of lading was tendered to him." Bowen, L. J., at p. 342, makes some very interesting observations on mercantile usage generally. He says:—"If we were to hold such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets, and one of the set is habitually dealt with as representing the cargo independently of the rest. If the set, for purposes of contracts like the present, must always be kept together, the whole object, be it wise or unwise, of drawing bills of lading in triplicate is frustrated. For if one of the set were lost, or had been forwarded by the shipper or any subsequent owner of the cargo to his correspondent by way of precaution, the cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the

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shipper or some previous owner of the goods. But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant, will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery."

TIME WHEN TENDER OF BILLS OF LADING TO BE MADE.

Before leaving this case it may be observed that in reference to a further point which came up in this case, though not necessary to be decided, Brett, M.R., expressed a view, which the other judges also incline towards, that the seller of goods under such a contract as that in question in this case, should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery either before the arrival of the vessel with the goods or before charges are incurred there in respect of them.

STOPPAGE IN TRANSITU—DELIVERY TO AGENT OF VENDEE—END OF TRANSIT.

The next case demanding notice is *Kendal v. Marshall, Stevens & Co.*, p. 356, which is on the subject of stoppage in transitu. The point of law illustrated by the decision is that though the goods purchased may not have reached the vendee, yet if they have been received by an agent of the vendee at some intermediate stage of their passage to the vendee, the transit is over for the purpose of

the vendor's right of stoppage in transitu. As Brett, L.J., says, p. 365:—"When the goods have arrived at the end of the journey upon which they have been sent by the vendee's orders, and have been received by the vendee's agent upon his behalf, the right to stop is gone." Or, in words of Cotton, L.J.: "So long as the goods have not been delivered the right to stop in transitu remains; but in order to ascertain whether the right still exists it is necessary to look at the persons and the place to whom and at which, as between seller and buyer, the delivery is to be made. If the goods get into the hands of the buyer before reaching their destination the right to stop is gone; for it is only when the goods are in actual transit that the seller can prevent their delivery. The goods, however, may be sent to an agent of the buyer to be held for him, and to be disposed of as he may direct; in a case like that, the agent has no control over the goods except on behalf of the buyer, and he is merely employed to carry out the buyer's order, and the right to stop is lost, because the goods have reached their destination, and the transit as between buyer and seller is at an end. The transit from the seller to the buyer is the only one to be considered in determining whether the seller can exercise his right of stoppage. For this purpose it is immaterial that the buyer, when the transit from the seller to him is at an end, starts them on to a fresh destination. This is a fresh transit, not from the seller to the buyer, but by or from the buyer."

INSURANCE A CONTRACT OF INDEMNITY—SUBROGATION.

The next case which has to be noticed is *Castellain v. Preston*, p. 380, which is an appeal from the decision of Chitty, J., commented upon at some length in this Journal, *supra* Vol. 18, p. 296-7. It may be remembered there was here a contract for the sale of a house, on which a policy of insurance existed. Nothing was said in the contract as to the policy. After the date of the contract, but before the date fixed therein for the com-

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pletion thereof, the fire took place, and the vendors received the insurance money from the company. The purchase was afterwards completed, and the purchase money agreed upon, without any abatement on account of the damage by fire. was paid to the vendor. The insurers then brought this action to recover the money paid by them on the policy, contending that the contract of insurance was merely a contract of indemnity, and unless they recovered in this action the defendants would receive double satisfaction. Chitty, J., however, held that the insurers were not entitled to recover back the insurance money from the vendors, either for their own benefit or as trustees for the purchaser. The Court of Appeal now over-ruled this, holding that the Company were entitled to recover a sum equal to the insurance money from the vendors for their own benefit, and it seems safe to predict that their judgments will hereafter be cited as the strongest authorities for the proposition that policies of fire or marine insurance are contracts of indemnity, and nothing more, and as enunciating the right of subrogation of insurers in its broadest and most extended form. The following passage in the judgment of Brett, L. J. puts this matter in a clear light, and is apparently concurred in entirely by the other judges: "In order to give my opinion upon this case, I feel obliged to revert to the very formation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, *shall be fully indemnified, but shall never be more than fully indemnified.* That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent

the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong * * * The doctrine of subrogation does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters, or insurers, in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited * * * Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished. That seems to be to put this doctrine of subrogation in the largest possible

RECENT ENGLISH PRACTICE CASES.

form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words, 'of every right of the assured.' I think the rule does require that limit * * * The contract in the present case (the contract of purchase) as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and labouring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed"—p. 386-392. And Bowen, L. J., at p. 404, says of the above language of Mr. Justice Brett: "It does seem to me, that taking his language in the widest sense, it substantially expresses what I should wish to express with only one small appendage that I desire to make. I wish to prevent the danger of his definition being supposed to be exhaustive, by saying that if anything else occurs outside it, the general law of indemnity must be looked at." And he says in another place, that in all the difficult problems that arise in connection with the subject, he goes back "with confidence to the broad principle of indemnity."

A. H. F. L.

REPORTS

RECENT ENGLISH PRACTICE CASES.

IN RE PAYNE, RANDLE V. PAYNE.

Imp. O. 16, r. 8—Ont. r. 97—Action by next friend of married woman—Security for costs.

[L. R. 23 Ch. D. 228.]

An action was brought by a married woman by her next friend, and an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with the action was dismissed with costs. Afterwards the plaintiff, by a different next friend, brought another action for the same purpose.

Held, the second action ought to be stayed till the costs of the first action were paid.

PENRICE V. WILLIAMS.

Imp. O. 31. r. 12—Ont. r. 222.

Order of reference—Production of documents—"Matters in question in the action."

[L. R. 23 Ch. D. 353.]

This was an application by the plaintiff, under the above English rule, that the defendants might be ordered to make an affidavit of the documents in their possession. The defendants objected on the ground (as was the case) that an order had been made by consent of the parties, referring the action and all matters in difference to the award of an arbitrator; and it was said that the effect of this order was that there was no longer any action or question in an action pending before the court, and therefore that the jurisdiction of the court was exhausted. The order relied on was an arbitration order, and provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matter in difference; also that the party in whose favour the award should be made should be at liberty, after the service of a copy of the award on the other party, to apply for final judgment in accordance with the award.

Held, the effect of the order was that, for all practical purposes, the action, so far as the court was concerned, had disappeared in every respect, with the exception that the court had to allow judgment to be entered up according to

the award : that the duty of the court in this respect was of a purely ministerial nature, and there was, therefore, so far as the court was concerned, no "matter in question in the action" within the above rule, and the power of the court to make the order asked for, or any other judicatory order was gone.

Held, also, that under the order the whole jurisdiction as to discovery was in the hands of the arbitrator.

The rule that an order of the court carries with it "liberty to apply" though not expressly reserved, only applies when the order is one not of a final character.

LYDNEY AND WIGPOOL IRON ORE
COMPANY v. BIRD.

Imp. O. 55, r. 2—Ont. r. 429.

Security for costs—Time for applying.

[L. R. 23 Ch. D. 358.]

The old chancery rule that an application for security for the costs of an action must be made promptly, is inconsistent with the above rule, and must be taken to have been abrogated :

Held, therefore, that an application by a defendant for security for the costs of an action brought against him by a limited Company might be made after reply and notice of trial.

IN RE BROWN, WARD v. MORSE.

Claim — Counter-claim — Costs where both succeed.

[L. R. 23 Ch. D. 377.]

When the plaintiff's claim and the defendant's counter-claim have both been successful, the plaintiff, in the absence of any special directions to the contrary, is entitled to the general costs of the action, notwithstanding that the result of the litigation is in favour of the defendant, and the defendant is entitled to receive from the plaintiff the costs of the counter-claim.

There will be no apportionment of such costs as would have been duplicated had the counter-claim been the subject of an independent action, but the plaintiff is not to recover as costs of the action any costs fairly attributable to the counter-claim.

KENNEDY v. LYELL.

Discovery—Privileged communications.

If the information of a party to an action as to matters of which discovery is sought, arises from privileged communications which he is not bound to disclose, as for example from information procured by his solicitors or their agents in and for the purpose of his defence to the action, and if the matters inquired into are not simple matters of fact, patent to the senses, as for example, if they are questions of pedigree, he ought not to be compelled to answer on his belief as to those matters.

Per COTTON, L. J.—"What is the ground on which all professional privilege is claimed? It is this—that having regard to the technical nature of our law it is of the utmost importance that no layman should be in anyway hindered from having the utmost freedom in communicating with his professional advisers, whether counsel or solicitors. There is also another principle, that no one is to be fettered in obtaining materials for his defence, and if he, for the purpose of his defence, obtains evidence, the adverse party cannot ask to see it before the trial. I do not think that this principle applies here, but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor."

ONTARIO.

(Reported for the LAW JOURNAL.)

ASSESSMENT APPEALS.

IN RE MIDLAND RAILWAY CO. OF CANADA
AND TOWNSHIP OF NORTH GWILLIMBURY.

*Assessment Act, s. 25—Land of Railway Co.—
How to be assessed.*

[McDOUGALL, J. J.—Sept., 1883.]

The assessment of the Railway Company's lands in this township, was as follows :

1 1-2 acres	-	-	\$2,500.00
50 acres	-	-	2,500.00
			<u>\$5,000.00</u>

The evidence showed that the average assessment of the ordinary farming lands on either side of the roadway (including the buildings) was \$31.00 an acre. There was no separate

assessment of the land alone. It was argued that under R. S. O. c. 180, sec. 26, sub-sec. 1, the same basis should be applied to the assessment of the Company's roadway, including the buildings situated on it, and that an acre and a half, which was the area of their yard at Sutton, and on which were erected their station buildings and warehouses at that point, should be assessed at the same value as the adjoining lands and that the buildings situated thereon should be assessed at what they are worth at the present time.

J. L. Biggar, for appellants.

John Paterson, for respondents.

MCDougall, J. J., *held*, that the point was well taken; that the law evidently meant that the roadway of a Railway Company should be assessed upon the average value of the lands adjoining, and not of the lands and buildings, but as in all other cases lands and buildings were not separated on the assessment roll, neither should they be so separated in the case of the Company's property, unless the buildings situated on the Company's lands were in excess of the average buildings situated on the farms adjoining. As to the 50 acres, the admitted area of the roadway in the township, exclusive of the acre and a half at Sutton, he held that the assessment therefor should be \$1,550.00, being an average of \$31.00 an acre, and that the acre and a half at Sutton, and the buildings thereon, should be assessed at their value, which was held to be \$950.00. The assessment was therefore reduced from \$5,000.00 to \$2,500.00.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

MONKHOUSE V. GRAND TRUNK RY. CO.

Provincial railways—Railway employees, injuries to.

The plaintiff, a workman employed by the Grand Trunk Ry. Co., was injured while in discharge of his duties by reason of the improper laying of the rails, his foot having been caught in one of the frogs of the road, for which injury he obtained a verdict for damages, which, on appeal, was set aside, and a verdict directed to

be entered for the defendants; the Grand Trunk Railway not being included in the statute 44 Vict. ch. 22 (O.)

Bethune, Q.C., for the appellants.

Mulock, for the respondent.

MCLAREN V. CANADA CENTRAL RY. CO.

Negligence—Contributory negligence—Evidence.

On an appeal from the judgment of the Court below (32 C. P. 324) the Court being equally divided, the judgment of the Court below was affirmed with costs.

Bethune, Q.C., and *W. H. Walker*, for the appellants.

McCarthy, Q.C., and *Creelman*, for the respondent.

PLATT V. AITRILL.

Costs of abortive hearing.

By reason of the retirement of Blake, V.C., (who sat in place of the C. J.) after the argument of this case, a reargument was directed by the Court.

Held, that the successful party was entitled to the costs of both arguments.

SAYLOR V. COOPER.

Right of way.

The judgment of the Court below (*ante* Vol. 18, p. 262) affirmed on appeal.

Moss, Q.C., for the appeal.

Bain, contra.

HOWES V. THE DOMINION INS. CO.

Mortgage, etc.—Fire Insurance—Change in character of risk.

The plaintiff executed a mortgage in favour of a Loan Co. whereby he covenanted to insure the buildings on the property, which he failed to do, but assented to the mortgagees doing so on his behalf, and they did effect an insurance in their own name instead of the plaintiff's, he repaying the amount of premium. The premises insured were described as a "two-storey frame, shingle-roofed building . . . owned and occupied . . . as a steam binding factory." . . . The property having been destroyed by fire

the Insurance Co. paid the amount insured and took an assignment of the mortgage from the Loan Co., and the plaintiff thereupon instituted proceedings against the insurance company, seeking to redeem the property on payment of what was due over and above the amount of insurance. In the course of the litigation it was shown that the premises instead of being used as a steam binding factory had been converted into a door and sash factory; of which change no notice had been given to the insurance company, although the change materially increased the risk.

Held, (reversing the judgment of the Court below), that the statutory condition as to change of occupation or use of the buildings without notice to the insurance company had been broken, thus invalidating the policy, and that the plaintiff was not entitled to any benefit thereunder.

COCHRANE V. BOUCHER.

Divisional Court, constitution of—Validity of judgment—Appeal.

In moving against a judgment of the Chief Justice, before whom and a jury the action had been tried, the full Court presided. When judgment was pronounced one of the puisne judges was absent, engaged in another court.

Held, that under the J. A. O. sec. 29, subs. 5, the judgment then delivered was invalid, and therefore could not be appealed against, and leave to appeal therefore was refused, but, under the circumstances, without costs.

Beck, for the defendant who moved.

NEILL V. TRAVELLERS INS. CO.

Leave to appeal to Supreme Court—Discretion of judge.

Held, (SPRAGGE, C.J.O., dubitante), that no appeal will lie from the order of a judge granting an extension of time within which to appeal to the Supreme Court. But *per curiam* where an appeal is from the exercise of discretion by the judge, the Court should not review such exercise of discretion.

Osler, Q.C., for the respondent who moved.

G. H. Watson, contra.

ARCHER V. SEVERN.

Will, construction of—Devise to creditor—Satisfaction.

The testator by his will, made in July, 1877, devised to his son G. certain real estate and brewery, expressing that "this devise to be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of \$36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell the lands in question, including the brewery, to G. for \$27,000, and the brewery plant for \$6,987.20, which was credited on G.'s claim against the testator. G. instituted proceedings against the estate of the testator, seeking to obtain payment of the amount for which the brewery premises and plant were sold, as having been devised to him, he swearing that he was ignorant as to the contents of the will.

Held, (reversing the judgment of the Court below), that the agreement entered into between the father and son superseded the devise to the son.

Bethune, Q.C., for appellant.

S. H. Blake, Q.C., for respondents.

CHANCERY DIVISION.

Ferguson, J.]

[June 6.

CLARK V. DARVAGH.

Devise—Condition that devise should be forfeited if the infant devisee went and lived with his father.

Devise to executors of real and personal estate of a testator in trust for the benefit of his infant grandson, G. H., "until he arrives at the full age of twenty-one years, at which time I direct my said executors to give to my said grandson the whole of the said property, subject nevertheless to the provisions hereinafter mentioned: . . . Should the said G. H. at any time time before coming of age go to live with his

father, W. H., he is to be disinherited of the whole or any portion of my estate, and the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." Nothing was shown that W. H. had done anything to deprive himself of the right to the custody and control of his child.

Held, that the infant took a vested interest, and the direction to give the property to him on his attaining twenty-one, only had reference to vesting in possession; and the condition debarring him from living with his father was a condition subsequent, and was void. It was right in the eye of the law that the child should live with his father. He was, by law, compellable by the father so to do, and to live with the father, when the father so desired, was the duty of the infant so far as a duty can by law be cast upon an infant, and assuming this to be so the condition was void as against law.

W. P. R. Street, Q.C., for the plaintiffs.

W. Cassels, Q.C., for defendant Jas. Darvagh.

W. R. Meredith, Q.C., for infant defendant G. Hodgins.

T. G. Meredith, for defendant W. Hodgins.

Boyd, C.]

[Oct. 10.]

MALCOLM V. HUNTER.

Division of watercourse—Acquiescence—Statute of Limitations—Onus.

Action for damages and an injunction to restrain the defendant from diverting a creek running across his, the defendant's land, from the channel in which it was alleged to have flowed for more than twenty years; and the plaintiffs claimed an easement in respect of the said creek, which, previous to the diversion complained of, supplied water to the mill of the plaintiffs, situated on adjoining land. It appeared that the said channel was an artificial cut diverting the water in the creek from its natural outlet, and that this artificial cut was made at the instance and by permission of the then owner of the creek in 1860, in order to give a better supply of water to the mill of the plaintiffs, one of whom was his nephew, and in part to supply some drainage to his, the uncle's land. The plaintiffs admitted that this was the origin of the watercourse in dispute, and it appeared the subsequent user continued upon the same footing.

Held, the onus was on the plaintiffs to make out their right, and to show there was a change in the mode of user, after it had originated by the said permission, which they had not done, and the action must be dismissed with costs.

A. J. Wilkes, for the plaintiffs.

Fitch & Lees, for the defendant.

Boyd, C.]

[Oct. 10.]

LONG V. HANCOCK.

Fraudulent preference—Pressure—R.S.O. c. 118.

Interpleader issue. The Hamilton Knitting Company being indebted to the plaintiffs for a large overdue account, application was made by letter and verbally, on the part of the plaintiffs for payment or security. The letters stated that the plaintiffs did not care to wait longer for a settlement; that if the account was not closed at once it would be placed in an attorney's hands for collection; and that the plaintiffs must insist on a settlement. The verbal demands made by the plaintiffs were to the same effect.

In compliance the company, which was in insolvent circumstances, gave a chattel mortgage to the plaintiffs covering all their available assets; the mortgage recited that the plaintiffs had agreed to loan the company \$5,000 on the said security, but the arrangement was that the plaintiffs should deduct the amount of the debt due them out of the pretended loan.

Held, that the above was a fraudulent preference, and there was no pressure to exempt the case from the provisions of R. S. O. c. 118.

The doctrine of pressure is not to be extended, and it has gone already to a length which approximates to absurdity. The proper conclusion from the facts of this case was that there was no *bona fide* pressure which induced the giving of the security, but that it was a device of a moribund company to prefer the plaintiffs to the other creditors, as all parties very well knew and designed.

Ferguson, J.]

[October 19.]

DUNN V. THE BOARD OF EDUCATION OF THE TOWN OF WINDSOR.

Mandamus to admit child to public school—Public school regulations—Want of accommodation.

Application for a *mandamus* to compel the defendants to admit the daughter of the plaintiff

into a certain public school in the town of Windsor, known as the Public Central School.

Mandamus refused, *firstly*, on the ground that the evidence showed that there was not accommodation at the school for the child; and this is a valid answer to such an application, especially where it appears as it did here that there was sufficient accommodation for the child at the other public school in the said town; *secondly*, on the ground that the application of the plaintiff was not made in the regular and proper way, under the Public School Regulations, inasmuch as it appeared that although the child in question was a registered pupil at the said other public school during the last term, she had not attended there at the commencement of the present term, as required by Public School Regulations, chap. 12, sec. 6, nor had the plaintiff applied to the inspector to have the child admitted to the Public Central School, as he should have done under chap. 12, sec. 7 of the said regulations.

N. W. Hoyles, for the applicant.

Foster, contra.

Ferguson, J.]

[Oct. 22.

WYLD V. MCMASTER.

Motion to continue interim injunction long enough to enable applicant to have the decision of the Court of Appeal on the point involved, the same being well decided in courts of first instance.

Motion by the plaintiff to continue an injunction, so as to preserve the subject matter of the action *in statu quo*, not only until the trial, but until the case could be heard before the Court of Appeal, on the ground that the cases in courts of first instance were unquestionably against the applicant, and therefore unless time was given him to carry the matter to the Court of Appeal, he would be without substantial relief. The applicant relied on some expressions in the judgments in certain cases of what the opinions of the judges might have been but for the decisions in the books, to show that there was a probability that the existing authorities on the points in question would be over-ruled if the matter went to appeal.

Held, that the motion must be dismissed with costs. The defendant was entitled to the benefit of the laws as they existed at the time of

action brought, and that which according to the law was his could not properly be kept from him for, perhaps, a long period, to the end that the plaintiff might have it determined whether or not such existing law was good and sound. This is an entirely different case to that of keeping property *in statu quo* pending an appeal in the same cause.

J. H. Macdonald, for the motion.

N. W. Hoyles and *W. Barwick*, contra.

Ferguson, J.]

[Oct. 22.

BOLTON V. ROWLAND.

This matter came up on further directions after the report of the Local Master at London. The action was brought by a mortgagor for an account of moneys in the hands of the mortgagee, after a sale under the power of sale in the mortgage, and the Master had found by his report a sum of \$136.38 in the hands of the defendant in favour of the plaintiff. The plaintiff now asked for the costs of the action.

Held, that the plaintiff was entitled to the costs of the action, although the defendant was a mortgagee, for this was not an action for foreclosure or redemption, but was a case of a defendant who had received money to the use of the plaintiff being sued for that money.

R. Meredith, for the plaintiff.

A. J. Cattnach, for the defendant.

PRACTICE CASES.

Proudfoot, J.]

[June 27.

SYNOD V. DEBLAQUIERE.

Petition to open publication—Single judge—Material evidence.

A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission, after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada—was brought on for hearing before PROUDFOOT, J., in Court.

Held, that as the application might, before the O. J. A., have been made to a single judge, and as there is no provision in that Act specially ap-

Prac. Cases.]

NOTES OF CANADIAN CASES.

[Prac. Cases.]

plicable to the subject, the original practice of the Court remains, and the application was properly made to a single judge.

Held, that upon the discovery of material evidence publication may be opened even after judgment affirmed by the two Courts above.

The learned judge considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition with costs.

S. H. Blake, Q.C., C. Moss, Q.C., and Walter Barwick, for the petitioners.

McCarthy, Q.C., Alfred Hoskin, Q.C., and Arnoldi, for the respondents.

Mr. Dalton, Q.C.]

[Sept. 15.]

TORRANCE V. LIVINGSTONE.

Counter-claim—Third parties.

An action by the plaintiffs as endorsees of a bill of exchange accepted by the defendant.

The defendant sets up that the bill was part of the price of goods bought by him from H. and G., the drawers, and the defendant files a counter-claim against the plaintiff, against H. and G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts between the defendant and H. and G. and claiming from H. and G. \$10,000 damages for breach of contract in respect of the said goods, and from the plaintiff and H. and G. the delivery up and cancellation of the bill sued on and other bills in the same transaction.

Upon the application of H. and G. the MASTER IN CHAMBERS struck out the counter-claim as against H. and G., and also struck out the names of H. and G. as defendants by counter-claim, following *Canadian Securities Co. v. Prentice*, 9 P. R. 329.

Worrell, for the defendants by counter-claim.

Aylesworth, for the defendant.

Mr. Dalton, Q. C.]

[Sept. 21.]

VICTORIA MUTUAL V. FREEL.

Principal and surety—Costs.

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood to each other in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judg-

ments, and then proceeded to enforce against his principal.

Motion by the principal to reduce the amount endorsed to be levied on the writs of *fi. fa.* issued against him by the surety.

Held, that the costs as well as the debt were recoverable by the surety as against his principal.

Aylesworth, for the defendant Freel, the principal.

Clement, for the defendant Foley, the surety.

Wilson, C. J.]

[September 28.]

DONOVAN V. BOULTBEE.

Notice of trial where trial postponed by order—Remanet.

Motion by the defendant to strike out this cause from the list of cases for trial at the Toronto Autumn Assizes, 1883. At the preceding Summer Assizes the cause was upon the list, and the trial was postponed by order of the judge at the trial, upon the defendant's application, with the condition that the defendant should pay the costs on the final result in any event of the cause. The Clerk of Assize placed the case upon the list for the next (Autumn) Assizes without any direction from the plaintiff or defendant. No notice of trial was served.

The MASTER held that in the case of a *remanet* no notice of trial is necessary under Rules of Court, 1876. Under the circumstances this case was not a *remanet* and a notice of trial was necessary. Order made without costs.

On appeal to WILSON, C.J., *held*, that a cause postponed by the order of the judge at the Assizes, upon the defendant's application, is a *remanet*, and no notice of trial for the next Assizes is necessary.

H. J. Scott, Q.C., for the defendant.

J. A. Donovan, plaintiff, in person.

Wilson, C. J.]

[Sept. 28.]

RAMSAY V. MIDLAND RY. CO.

Examination for discovery—Office of corporation—Station agent.

A station agent of a railway company is an officer examinable under R. S. O. c. 50, sec. 156. An appeal from the order of Mr. Dalton directing the agent of the defendants, at the Orillia station, to be examined as an officer of the corporation under sec. 157 of the C. L. P. Act.

WILSON, C. J.—The statute should, I think, receive a liberal construction, for the knowledge of the business and affairs is and can only be in the agents and officers of the company who transact it. How far the word "officer" may be carried I do not now consider, but I have no hesitation in saying that an office or agency established by or for the company at these stations, and a person appointed by or for the company to manage and carry on its affairs, of the important and diversified nature of which they consist at these stations, and possessing and exercising the extensive powers with which he is and must be entrusted to enable him to discharge his duties towards the company, do constitute such a person an officer of the company within the meaning of the statute.

Aylesworth, for the defendants.

Clement, for the plaintiff.

Appeal dismissed with costs.

Wilson, C. J.]

[Sept. 28.]

HOLLINGSWORTH V. HOLLINGSWORTH.

Security for costs—Application for affidavit of information and belief.

An appeal from the order of the local judge at Brockville refusing to direct the plaintiff to give security for costs.

An affidavit filed by the defendant, set out that:—"The said plaintiff has for some time past and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this Court, having taken up his residence in the State of New York, one of the U. S. A."

Held, that the foreign residence of the plaintiff is here positively sworn to, and the affidavit is sufficient in substance for the Court to act upon in ordinary security for costs.

Semble, that it is the better opinion that a statement of the plaintiff's residence out of the jurisdiction, on information and belief, is not sufficient to entitle the defendant to security for costs.

Tilt, Q.C., for the appeal.

A. H. Marsh, contra.

Appeal allowed.

Wilson, C. J.]

[Oct. 12.]

MORTON V. GRAND TRUNK RY.

Trial postponed—Second payment of fee on entering record.

Where the trial of a cause was postponed till the next assizes, "defendants to pay the costs"—

Held, that no second fee was payable to the Deputy Clerk of the Crown upon entry of the action for trial at the later assizes, and that when so paid by plaintiff such fee was not taxable against defendants.

Dickson (Blake, Kerr, Lash & Cassels), for the plaintiff.

Aylesworth, for the defendants.

Wilson, C. J.]

[Oct. 12.]

MERCHANTS' BANK V. HUSON.

Interpleader—Question to be tried—Issues.

Upon an interpleader application by the Sheriff of York there were two execution creditors, viz., the Merchants' Bank of Canada and one James Walsh and three claimants, viz., one Clarkson, the assignee of the execution debtor, for the general benefit of creditors, the Imperial Bank of Canada, and the Standard Bank of Canada, both claiming under warehouse receipts. The MASTER directed the trial of four issues, viz., (1) The Merchants' Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) the Standard Bank, plaintiffs, against the Merchants' Bank and Clarkson, defendants; (3) the Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) the Merchants' Bank, plaintiffs, against James Walsh, defendant, (as to priority of execution).

Upon appeal by the claimants, the Imperial Bank of Canada,

WILSON, C. J.—I think the Merchants' Bank might be plaintiffs or defendants, and all the claimants joined as opponents, and the question would be whether the claimants or any, and if any, which of them, have the right to the goods as against the Merchants' Bank. If all the claimants had the better title as against the Merchants' Bank, the judge would not, under that issue, try the title between the claimants themselves. The claimants must settle their rights between themselves, the purpose of the issue having been answered by its being settled that the execution creditor is not to have his

execution satisfied out of the goods which were seized by the sheriff.

Order of the MASTER varied. For the first three issues set out above one is substituted, viz., the Merchants' Bank, plaintiffs, against the Imperial Bank, the Standard Bank, and Clarkson, defendants.

Aylesworth, for the sheriff and for Walsh.

Rae, for the Merchants' Bank.

Rose, Q.C., for Clarkson.

Shepley, for the Imperial Bank.

A. H. Marsh, for the Standard Bank.

Wilson, C. J.]

[Oct. 16.

WHITE SEWING MACHINE CO. V. BELFRY.

Taxation — Duty of taxing officer — Division Court costs — Jurisdiction of Division Court.

An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for \$103.80, and the other for \$106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs the Master made an order, under Rule 322 O.J.A., for final judgment against the defendants for the first parcel of goods sold and delivered, *i.e.* for \$103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the Court."

Under this order the Taxing Officer allowed the plaintiffs County Court costs on that part of his claim upon which they obtained the order for judgment, and he allowed to the defendant the full costs of the High Court of Justice on that part of the plaintiff's claim upon which the defendant succeeded, *i.e.* upon the claim for \$106.40, the price of the second parcel of goods.

Upon an application by the defendants to revise the taxation of the officer:—

Held, that it was the duty of the Taxing Officer to look at the pleadings, and if necessary to receive affidavits so as to ascertain the facts of the case.

Held, that Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and

was therefore within the competence of the Division Court.

Held, that the defendants should have Superior Court costs down to and including the statement of defence, which would not have been required but for the plaintiff claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set off *pro tanto* against the plaintiff's judgment and costs.

Aylesworth, for the plaintiff.

Shepley, for the defendants.

Ferguson, J.]

[Oct. 19, 1883.

CARNEGIE V. FEDERAL BANK.

Examining witness before trial—Rule 285 O.J.A.

An action for an account of the dealings of the Federal Bank with certain shares of Ontario Bank stock pledged to the Federal Bank by the plaintiff.

Upon the application of the plaintiff the MASTER IN CHAMBERS made an order for the examination before the trial of Charles Holland, the Manager of the Ontario Bank, under Rule 285 O. J. A. Mr. Holland was not a party to the suit, nor was the bank of which he was an officer, nor was it shown that there was any reason for his examination, such as his being seriously ill, or his being about to leave the jurisdiction, but it was admitted that the object was to obtain discovery from a witness before the trial.

Upon appeal to FERGUSON, J.:—

Held, that Rule 285 O. J. A., does not contain authority to make an order for the examination before the trial of a person not a party to the action where no greater necessity for making it appears than the convenience of the party who applies for the order in presenting his case for the trial. *Fiske v. Chamberlain*, 9 P. R. 283, distinguished.

Cattanach, for the appeal.

J. R. Roaf, contra.

Appeal allowed with costs.

THE BENCH AND THE BAR.

THE BENCH AND THE BAR.

The following was the address presented by the Bar of the County of Simcoe to His Honor Judge Gowan, on the occasion of his retirement from the Bench, with his reply thereto :

His Honor James R. Gowan, late local Judge of the High Court of Justice, and Senior Judge of the Judicial District of Simcoe.

We, the practising barristers and solicitors of the County of Simcoe, cannot allow the occasion of your retirement from the judicial bench to pass without testifying, however inadequately, the high esteem in which we hold you, and our regret that the relations so long existing between us, are about to be severed.

The benefits derived by this County during the last forty-one years from your high attainments and administrative ability, have been incalculable. Courts have been organised ; the legal business has been conducted with precision and decorum ; and the judgments you have given in the vast number of cases that have come before you, have been luminous, dignified and impartial. Nor can we forget that some of the most important enactments on our statute book owe their development and moulding into shape, to the sagacious advice you were at all times willing to afford, when called on by the rulers of the state.

And not to the county alone have your services been beneficial, for your system of organization, and the example of your courts, have spread beyond our borders, and have had marked influence in every county of the Province, but space will not permit us to enlarge on this, otherwise we should be led into a general reference to the affairs of the Province, and possibly of the whole Dominion, so great has been the influence of your abilities and industry in various directions during your term of office.

To us, you have ever been courteous, considerate and kind ; to your discouragement of all that is unworthy, by your inspiring sense of honour, we attribute the high standing we have attained, and we feel assured that the tradition of your career will be long remembered, not only by the generation now living, but by those who may come after us.

We accordingly contemplate with affectionate concern the withdrawal from us of one to whom we owe so much.

We trust, however, that your intended sojourn in a more genial climate will produce every good result, and that under the care of an all-disposing God, your return to us may be the commencement of a new era in your life, and you may be enabled to pursue it with continued usefulness.

That you may be sometimes reminded of the cordial relations that existed for so many years between yourself and the County of Simcoe, we desire to present you with the accompanying

piece of plate, which we know you will value, not for its intrinsic worth, but for the feelings that prompted the gift.

On behalf of the Bar of the County of Simcoe.

J. E. P. PEPLER,

Secretary.

W. LOUNT, Q.C.,

Chairman of Committee.

Barrie, Oct. 16, 1883.

THE FOLLOWING IS THE REPLY :

Mr. Lount and Gentlemen,

I thank you with all my heart for the very kind address with which you have honored me. I wish I could feel that I fully deserved all you say. Ever sensible of my many deficiencies, I tried to make up for them by a laborious assiduity and exactitude in fulfilling every known duty to the utmost of my ability. It is the only merit I can claim, and I am by no means sure I could have done much had I been without the stimulus which a learned and energetic bar always gives to the Bench. And now, in retiring from the accustomed scene of my labors, and severing the relations that have connected us for so many years, the sadness, to me, is soothed by the regrets you express, whilst the approving testimony you bear to my humble services is the best award any public servant could desire.

When I recall the state of things as they were when I first set foot here, and the wonderful improvements that have, since 1843, been effected in our legal, municipal and educational systems, the increased facilities for travelling, and the marvellous progress and prosperity of the country at large, there is opened to me a wide and pleasant field for observation upon which I should like to dwell, but it is not possible to do so at present. This I may say, however : in no particular is progress so marked as in the growth of the Bar here and elsewhere, in numbers, in influence and trained knowledge.

The rapid flight of time is brought before me when I remember that of the present large Bar several of the seniors were school boys when I was appointed to the judicial office, and several others were born since my first Court was held in the District. It has been my great good fortune to be surrounded and aided in the discharge of my official duties by those whom I have known since their childhood, and never, in a single instance, has anything disturbed the pleasant relations between the Bench and the Bar in this judicial district. You can understand, then, how warmly I reciprocate all you can possibly feel towards me. I well know that the industry and ability of the Bar has smoothed many a difficulty for me in the way of judicial investigations, and it is exceedingly gratifying to me to recall the high professional tone which always prevailed, and could always be safely confided in, being grounded on convictions of duty, and a nice sense of honor—securing a liberality in

THE BENCH AND THE BAR.

practice beneficial to clients, and speeding the disposal of matters really in dispute between litigants. I am proud to know that this Bar is conspicuous in the Province for the ability of its members, the number who have attained high position in their own peculiar field, as well as in public life, who have ably served the public in the courts and elsewhere with all the honesty, zeal and courage which have secured for our honorable profession its high standing amongst an educated and most intelligent people, very tenacious of their rights. Such is the simple fact, and if indeed I have in any degree impressed upon the profession my views of their honorable and responsible duties, I feel thankful indeed. I may repeat what I said on an occasion similar to the present, viz.: That I felt it was right that I should endeavor to discharge every duty faithfully and fearlessly: create confidence in suitors and to secure to them the full benefit of the several courts over which I presided, and to impress the public with the feeling of respect never withheld from a court of justice, however limited its sphere, where order and decorum obtain, and that from the first I felt that this could best be done with the aid of an educated and an honorable Bar, who would feel with me that we were all ministers of justice—all equally striving for the same great end. What I said fifteen years ago, I can emphatically repeat, that from the profession in this County I have always received the greatest aid in the discharge of my judicial duties, and it is to your cordial co-operation and support I am indebted for a measure of success that, unassisted and unsupported, I could scarcely have attained. In gladly according to the Bar every privilege they could fairly claim, in fostering a right feeling in their intercourse with each other, in publicly combating prejudices against them, I have ever felt I was strictly within the line of duty; but I think you will acquit me of the weakness which fails to look for the inherent merits of a case in admiration for the skill and zeal of counsel.

The kind consideration you have always shown me I have every confidence you will extend to my successors. It is a consolation to me to know that my learned brother Judge Ardagh takes my place. Educated in the county, and with an experience of some ten years on the Bench, the profession and public will not lose by the change. You all know Mr. Boys, who will be the Junior Judge, and his very honorable position at the Bar. With two such worthy men at the Bench of this Judicial District, both in the prime of life, the profession and the public, I repeat, will gain by my retirement.

Though giving up active duty I shall still consider myself as in a sense having harness on my back, being empowered still to take occasional duty; and I may here mention that the Government of Ontario continues me in the position of Chairman of the Board of Judges.

Let me say one word as to my retirement, as you are aware this is the largest Judicial Dis-

trict in the Province, having a population, not very long since, equal to that of Manitoba and British Columbia together. The duties are very onerous, requiring the services of at least two active men to perform properly and with promptitude in the various duties made incident to the Judge's office; and I felt the time had come when in justice to the public and my brother Judges I should make way for a younger man. My age and uncertain health demanded more repose than I could properly ask to take, and so I sought retirement, and after forty-one years of hard work, it cannot be said that my appeal to be relieved was in any sense premature. Indeed I have the satisfaction of knowing that His Excellency appreciates, as he is pleased to communicate, my "faithful, efficient and impartial conduct during my long term of Judicial service." You are good enough to refer to other work I have been engaged in—I did try to be of some use outside my official engagements, when employed in matters of public interest and concern. It was I felt only my duty to render such willing aid as was required of me by those who were anxious to promote all that was good and safe in the improvement of the law and its administration, and who were in the high position which enabled them to give effect to their desires. And should I return, as I trust I shall, with restored health, I hope to find some opening of usefulness, for I feel that I am not without a residuum of energy, and I could not well live an idle life.

I would fain say more, and with all the warmth that words can convey, but as I leave for England to-morrow, you know how much I am occupied, and how disturbing are necessary preparations, and you will excuse my imperfect expression of thanks. I should indeed be insensate if I was not touched deeply by your kindness. I may well feel honored by this last mark of your regard, and by the more than kind words you have addressed me.]

His Honor here referred to the testimonial and said:

I shall praise it as my most valued possession, more to me than any other honor that could be conferred, for you use it to set the seal, as it were, to what you in your spontaneous kindness have said. It is not the only token I have had from the profession of their regard, and I should feel humbled to the very dust if I had not aspired from the first to accomplish some of the good that in your partial judgment you couple with my poor efforts.

I would thank you once again for the unbroken attention, respect and kindness of years, and my earnest prayer is that God may bestow upon you, and those dear to you, His richest blessings here, and an eternal life beyond.

I bid you an affectionate farewell.

JAMES ROBT GOWAN.

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DIARY FOR NOVEMBER.

16. Fri. . . . Wilson, J., Q.B., and Gwynne, J., C.P., 1868.
18. Sun. . . . *Twenty-sixth Sunday after Trinity.* Hagarty,
C. J., sworn in C. J. of Q. B., Wilson, J., sworn
in C. J. of C. P., 1878.
21. Wed. . . . Princess Royal born, 1840.
25. Sun. . . . *Twenty-seventh Sunday after Trinity.* Lord
Lorne, Gov.-General of Canada, 1878.
27. Tue. . . . Cameron, J., sworn in Q. B., 1878.
30. Fri. . . . Moss, J., appointed C. J. of Appeal, 1877.

TORONTO, NOV. 15, 1883.

AN addition has been made to the existing aids to practice in the Notes of Practice Cases just published by Messrs. Lefroy and Cassels, as to which we will merely say that we hope that the largeness of its utility compared to that of other works on practice, will prove to be in inverse proportion to the smallness of its dimensions.

WE are indebted to Mr. Fenton, the Crown Attorney of the County of York, for the report of the Sunday shaving case, which excited a good deal of interest at the time, but which for some reason or another, has never found its way into the regular reports. This judgment appeared in one of the daily papers, but it is desirable that it should be preserved for the use of the profession in some more permanent and accessible place. We therefore make no apology for reprinting it even at this late date.

THERE is no objection to complaints being made as to anything that may be defective in the arrangements at Osgoode Hall, or such other matters affecting the profession as are

under the control of the Benchers; but it is only fair that such complaints should first be made to that body, either directly or at least through the medium of a legal journal. We presume the Benchers would be glad to remedy any evil in their power; but should they fail or refuse to do so it would then be time enough to publish the grievance in the daily papers. The members of the Law Society are, as it were, members of a legal club. It would be looked upon as an outrage if a member of a social club rushed into print whenever he thought something was wrongly done. A letter recently published in a daily paper, on a trivial matter at Osgoode Hall, is the text for these remarks, which are also of more general application.

WE publish in our present number an article which we think will be read with interest, and perhaps provoke some discussion on the relation between leading and junior counsel in connection with the conduct of the argument of a case. It will be remembered that in the *International Bridge Co. v. Canada Southern Ry. Co.* 7 App. 228, Spragge, C., said:—"We think that junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their senior counsel." This, however, was the *dictum* of the Chancellor alone, and, though the other judges of appeal did not consider it necessary to revert to the point, it does not necessarily follow that they would, had it been of material importance, have concurred in it. The junior counsel in the case had, as a matter of fact, been heard, and therefore the question was not important to the actual decision of the case. When the case was brought up before the Privy Council mention

JUNIOR COUNSEL.

was made of this *dictum*, and some discussion as to its propriety took place. It is owing to the courtesy of Mr. A. J. Cattanach that we are able to give our readers the information contained in our article.

JUNIOR COUNSEL.

In *International Bridge Co. v. Canada Southern Ry. Co.*, 7 O. A. R. 226, it was laid down that "junior counsel are not at liberty to take positions in arguments which conflict with the positions taken by their leaders."

The case under consideration involved the right of a plaintiff corporation to collect tolls for the use of a bridge under a certain Act. The senior counsel for the defendants, in opening the defence, conceded the right to collect tolls as incidental to the powers of of the Corporation, but contended that the tolls must be reasonable. The junior counsel being of opinion that the power was not incidental, and having obtained the leave of his leader to argue the point, contended that there was not even a limited power of collecting tolls as the power was not expressly given, and that therefore the plaintiff corporation was not entitled to collect any tolls under the Act in question.

The learned Chief Justice of Ontario, while denying the right of junior counsel to argue the point, permitted him to proceed owing to the importance of the case; but in delivering the judgment of the Court, expressed his disapproval of the course taken, and held that it was not open to junior counsel to take such a course.

The case was carried to the Privy Council, and in the course of his argument there Mr. Horace Davey, Q.C., called in question the practice as thus laid down. It was unnecessary to argue the point as it did not affect any of the issues involved in the case; but from the remarks made by Mr. Davey, and

the response of the Lord Chancellor, it appears that no such rule as that referred to by the Chief Justice of Ontario is recognized in England. It also appears from the stenographic report, that no mention was made in the Privy Council of the fact that junior counsel had been permitted by his leader to take the course under review, so that the conclusion to be gathered from the remarks of Mr. Davey and the Lord Chancellor does not appear to depend on whether counsel had or had not previously arranged between themselves as to the mode of conducting the argument. In their view apparently the Court cannot refuse to listen to junior counsel simply because he differs from his leader on a point in the case. We have been favoured with the stenographer's notes of what took place on this point. They are as follows:

MR. HORACE DAVEY.—. . . In the suit in which the railway company are plaintiffs, and the bridge company defendants, the same points are raised as in this suit, and the two were argued together. Mr. Crooks conceded—the leading counsel for the present appellants—"That it was incidental to the corporate powers of the bridge company to require payment of tolls from Railway companies for the use of the bridge, and to fix the amount of tolls to be paid for such user. This, indeed, was denied by his junior counsel, Mr. Cattanach"—then there are some observations on Mr. Cattanach which are hardly well founded.

THE LORD CHANCELLOR—It would require some argument before I accede to the proposition that junior counsel are not at liberty to take points which their leader has not taken.

MR. DAVEY—I have known junior counsel in this country, I think, who have taken that course.

It is difficult to understand why junior counsel should be fettered and held strictly to the line taken by his leader by the Court. The case can easily be imagined of there being an irreconcilable difference of opinion between counsel engaged in a case as to the best mode of conducting it, and of there being an evenly balanced question of law upon which the members of the Court itself might differ. Why in such a case should the Court interfere to prevent the case from

RECENT ENGLISH DECISIONS.

being argued in more than one way. Must one of the counsel withdraw simply because the Court will only hear a partial statement of their views? Surely the parties most interested in success can be trusted to look after their own interests; and, as the object of the Court is to get at the rights of the case, what objection can there be to hear all that can be said about the case?

RECENT ENGLISH DECISIONS.

Continuing to review the cases in the September numbers of the Law Reports, the next case in the September number of the Q. B. D. is the much discussed one of *Chamberlain v. Boyd*, p. 407.

DEFAMATION—SLANDER—REMOVEDNESS OF DAMAGE.

It will be remembered that two brothers of Mr. Chamberlain, a member of the present English ministry, were rejected on their standing as candidates for the Reform Club in London. At the time of their rejection the power of electing new members was in the hands of the members of the club. It was afterwards proposed to transfer the power of election of members to the committee of the club, but this proposed alteration of the regulations of the club was not carried. One of the rejected Chamberlains now brought this action against a member of the club, seeking damages against him, and setting out in his claim that by reason of certain defamatory statements "the defendant induced, or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate, with the chance of being elected. And the plaintiff suffered in his reputation and credit." The defendant demurred, and the Court of Appeal unanimously sustained

the demurrer on two grounds: (1) because no damage was alleged in respect of which the law allows an action to be brought; (2) because the alleged damage was not the natural and probable result of the words complained of. As to the first point Lord Coleridge, C.J., observes that "the damage alleged is unsubstantial and shadowy, and is in truth incapable of being estimated in money; and where words spoken, as in the present case, are not actionable in themselves, they can become actionable only when they have been followed by pecuniary or temporal damage." And as to the second point the opinions of the Law Lords in *Lynch v. Knight*, 9 H.L.C. 577, are cited with approval. While on the case generally Bowen, L.J., speaks as follows, at p. 416:—"Putting the case in the strongest manner for the plaintiff it only comes to this—that the refusal to alter the regulations kept him, the plaintiff, in a position in which an election might or might not result in his being chosen a member. But that appears to me to leave the damage too remote, and to place it beyond the line which the law has wisely drawn. The risk of temporal loss is not the same as temporal loss; the risk of suffering injury is not the same as to suffer injury. If it were otherwise the limitation which the law imposes on liability to actions for words spoken would be entirely done away with, because the party defamed could always urge that he had lost the chance of an advantage, or had run the risk of an injury. But the 'chance' of an advantage is not the same as the advantage, and the risk of an injury is not the same as an injury."

ACTION FOR MALICIOUS PROSECUTION—ONUS OF PROOF

The next case to be noticed is that of *Abrath v. North Eastern Ry. Co.*, p. 440, a case concerning the onus of proof in actions for malicious prosecution. The point of the case is somewhat difficult to grasp at first, and the head-note is not very lucid. The gist of the case may perhaps be shown as follows:—First, it is laid down by Brett, M.R., p. 448, "The points which it is necessary for the

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plaintiff, to substantiate (*i. e.* in an action for malicious prosecution) in order to make out his claim, are not really in doubt; they have been decided over and over again, and have been decided for more than two hundred years; it is not enough for the plaintiff to show, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to show that the prosecution was instituted against him by the defendants without any reasonable or probable cause, and with a malicious intention in the mind of the defendant, that is, not with the mere intention of carrying the law into effect, but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff." This language is reiterated later on by Bowen, L.J., at p. 455. Then these propositions being laid down to start with, the point of the present decision of the Court of Appeal appears from the words of Brett, M.R., when he says:—"Now it seems to me that whenever a claim or defence consists of several necessary parts, he on whom the burden of proof of the whole rests, has also on him the burden of proof of each of these necessary parts. The burden of proof lies on the plaintiff to show that there was an absence of reasonable and probable cause; *if in order to show the absence of reasonable and probable cause there are minor questions which it is necessary to determine, it seems to me that the burden of proving each of these minor questions lies upon the plaintiff just as much as the burden of proving the whole does.*" Now this was the case in the action before the court. The innocence of the plaintiff, in respect of the matter for which, as he alleged, he had been maliciously prosecuted, was established, but in order to decide the question of whether the prosecutors had reasonable and probable cause for commencing the proceedings complained of, the judge found it necessary to ask the jury to find whether the

prosecutors had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates, before whom they had prosecuted the present plaintiff. The present decision establishes that the burden of proof as to these minor questions was on the plaintiff, as well as the burden of proof as to the larger questions to which they were subsidiary. In the language of Brett, M.R., "The burden of proof of satisfying a jury that there was a want of reasonable care, lies upon the plaintiff, because the proof of that want of reasonable care is a necessary part of the larger question, of which the burden of proof lies upon him, namely, that there was a want of reasonable and probable cause to institute the prosecution."

WHAT IS MISDIRECTION?

There is another passage in the judgment of the M. R. which it seems desirable to notice here. At p. 453 he observes:—"It is no misdirection not to tell the jury everything which might have been told them; there is no misdirection unless the judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said, or that something was said which would make wrong that which was left to be understood."

INNOCENCE PRIMA FACIE EVIDENCE OF WANT OF REASONABLE AND PROBABLE CAUSE.

Again in the judgment of Bowen, L.J., there is a passage which it would be departing from the scheme of these articles not to notice. He says, at p. 462:—"Something has been said about innocence being proof, *prima facie*, of want of reasonable and probable cause. I do not think it is. When mere innocence wears that aspect it is because the fact of innocence involves with it other circumstances which show that there was the want of reasonable and probable

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cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true . . . except in cases of that kind it never is true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause."

In the September number of the P. D., being 8 P. D. p. 149-178, there are one or two short cases to be noticed.

PROBATE—MISTAKE—INCONSISTENT ATTESTATION CLAUSE.

The first is *In the goods of Atkinson*, p. 165. Here it appeared that in an attestation clause of a third codicil of a will, it was stated by mistake that the first codicil was cancelled. The attestation clause in question was as follows:—"Signed by the said (testatrix), as a third codicil to her will, by which the first codicil is cancelled in the presence of us both present at the same time, who, in her presence, at her request, and in presence of each other, herewith subscribe our names as witnesses." Sir J. Hannen held that an attestation clause forms no part of a codicil, and that therefore the first codicil must be admitted to probate. He says:—"It is immaterial that the attestation clause is written by the testatrix, and whether written by her or anybody else it is only an interpretation put upon the codicil which the testatrix was then about to execute, and forms no part of the codicil."

PROBATE OF WILL ABROAD.

In the next case, *In the goods of Miller*, p. 167, the president declares it to be the practice of the court to require that codicils must be proved in the court from which probate of the will has been obtained; so that, if a will has been proved abroad, probate of the codicils, if any, must be granted by the court which granted probate of the will."

REVOCATION OF WILL—REVOCATION OF CODICIL.

In *In the goods of Bleckley*, p. 169, T. M. B. having executed a codicil at the foot of his will, cut off his signature to the will; and upon proof that he thereby intended to revoke the codicil, the court held that the codicil was also revoked.

WILL—CAPACITY.

Lastly, *Parker v. Felgate*, p. 171, is a case of importance, but again the head-note does not seem very satisfactory. The case decides that if a testatrix has given instructions for her will, and it is prepared in accordance with them, the will will be valid though at the time of execution she merely recollects that she has given instructions, and understands that she is executing the will for which she had given instructions, but does not remember and understand what the instructions were, and is not capable of understanding each clause of the will if put to her. Sir J. Hannen says:—"The law applicable to the case is this: if a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a will, making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me, as carrying it out.'"

A.H.F.I.

C. P. Div.]

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[C. P. Div.]

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

HIGH COURT OF JUSTICE—COMMON
PLEAS DIVISION.

REGINA V. TAYLOR.

*Lord's Day Act, Con. Stat. U. C. cap. 104—
Shaving.*

The defendant, a barber, was convicted before a Justice of the Peace for exercising the worldly labor and work of his ordinary calling by shaving customers for hire at his shop on Sunday, contrary to the Lord's Day Act, Con. Stat. U. C. cap. 104. Upon *certiorari* motion was made to quash the conviction on the ground that shaving was an act of necessity within the exception of the Act.

Held, (1) that a barber is a workman within the Act; (2) that shaving by a barber in the ordinary cause of his business is a violation of the statute, and not a work of necessity or charity.

Philips v. Innes, 4 Cl. & F. 234, approved.

Quare, whether a barber in an hotel or boarding-house might not, by arrangement with the keeper, be deemed a servant, to do the work of shaving guests or the family on Sunday.

[February 18, 1882.]

The defendant, A. P. Taylor, a barber, was convicted before Thomas Carr, a Justice of the Peace, for having exercised the worldly labour and work of his ordinary calling by shaving customers for hire at his shop in Yorkville, on Sunday, and fined \$2 and costs. The conviction and evidence having been removed by *certiorari* into the Common Pleas Divisional Court, a motion was made to quash the conviction before WILSON, C.J., which was referred to full court.

Ritchie, for defendant.—The shaving of customers by a barber is a work of necessity within the meaning of the exception in the Lord's Day Act.

Fenton, County Crown Attorney, contra, relied on *Philips v. Innes*, 4 Cl. & F. 234.

WILSON, C. J.: The statute in question (C. S. U. C. ch. 104), is as follows: "It shall not be lawful for any merchant, tradesmen, artificer, mechanic, workman, laborer, or other person whatsoever on the Lord's Day to sell or publicly show forth, or expose or offer for sale, or to purchase any goods, chattels or other personal property, or any real estate whatsoever, or to do or exercise any worldly labor

business or work of his ordinary calling (conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines, and other works of necessity, and works of charity, only excepted).

The defendant is, in my opinion, a workman—one of the class of persons named in the statute. The act of shaving he is charged to have performed as a barber is an act that was done by him in the ordinary course of his business as a barber, and it was done on the Lord's Day, and was not a work of necessity or charity. It was that kind of worldly labor which the statute expressly forbids being done on that day.

The case of *Philips v. Innes* 4 Cl. & F. 234, applies very closely to this case, because the House of Lords declared the business of shaving by a barber on Sunday was not "a work of necessity or mercy," which is the language of the Scotch Law. In that case the master was attempting to compel his apprentice to serve in the shop on Sundays till about 10 a.m., and to shave the customers of his master, who frequented the barber's shop on that day for the purpose of being shaved, and the decision was reversing the judgment of the Scotch Court, that the apprentice could not be required to do that which was unlawful to do on such a day.

It has been decided in England that a baker or cook may supply his customers with their meals prepared by such baker or cook at his usual place of business upon Sunday, because many persons have not the means of doing such work themselves, and it is of necessity that they must eat.

There is a great difference between such a business as that and carrying on the work of shaving. The business of a barber, I presume, could, while it was associated with that of surgery, have been carried on on Sunday. These two very dissimilar professions were united by the 32 Henry VIII. ch. 42, but were severed by 18 George II. ch. 15, because "the barbers belonging to the corporation have for many years been engaged in a business foreign to and independent of the practice of surgery"—a very satisfactory reason. Since then the barber is nothing more than a workman, one who performs mere manual labor, and he cannot lawfully exercise his calling on Sunday any more than any other workman may.

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I do not say that a barber connected with an hotel or boarding house may not, by arrangement with the hotel or boarding house keeper, follow his ordinary calling on Sunday in such hotel or boarding house, and be considered in the light of a servant kept in a private family to do the family work of a barber on Sunday as well as upon other days.

In this case we cannot do otherwise than discharge the motion, but without costs.

GALT, J., concurred.

OSLER, J.—I feel bound by the decision of the House of Lords in the case of *Philips v. Innes*, 4 Cl. & F. 234. In my judgment the cases of a baker and a barber are not distinguishable. I question very much the expediency of prohibiting barbers from carrying on their business on the first day of the week.

Motion dismissed.

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CLARK V. UNION FIRE INS. CO.

Insurance — Provincial companies — B. N. A. Act—Foreign contracts—Lex loci contractus.

A company incorporated by a Provincial Legislature for the business of insurance, possesses the same attributes and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliament, and may enter into contracts outside the Province, wherever such contracts are recognized by comity or otherwise.

The term "Provincial objects," in the B. N. A. Act, refers to local objects within a Province, in contradistinction to objects which are common to all the Provinces in their collective or dominion quality.

The legislative enactments of a country have no binding force *propria vigore* in another country; and a legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a legislature assumes so to do, such authority is only a legislative sanction to the agreement of the corporators to transact their business at home and abroad.

A contract executed in Toronto and delivered to the contractee in New York is governed by the laws of Ontario.

So a contract signed and sealed in blank in Toronto, and sent to an agent in New York to be filled up and delivered to the contractee there, is a contract made in Ontario by relation to the signing and sealing there.

Where no place of payment of a policy of insurance is mentioned in the policy it must be assumed that the place of payment is where the head office of the insurance company is situated.

The facts of the case fully appear in the judgment.

Falconbridge, for claimant.

W. A. Foster, for plaintiff.

A. C. Galt, for defendant.

The MASTER IN ORDINARY:—This is a claim brought in by the Export Lumber Company of New York against the defendants, a Fire Insurance Company incorporated by the Legislature of Ontario, 39 Vict. c. 93. The policy is dated 5th August, 1880, and was delivered to the claimants on the 7th or 8th, and the fire occurred on the 10th of the same month. On the 11th the claimants tendered a cheque for the premium, which was immediately returned by the defendants.

The principal defences are that the defendants being a Provincial company have only limited powers, and could not make contracts in foreign countries, and that the premium not having been paid or tendered until after the loss occurred, the policy is void.

In arguing that the contract was *ultra vires* it was contended that as the B. N. A. Act (s. 92 subs. 11) empowered the Provincial legislatures to incorporate companies with "Provincial objects," this corporation could have no existence, and therefore no power to contract, outside this Province; and in any event that not having obtained legislative sanction authorizing contracts of insurance outside the Province, this contract was void.

The substantial objection is against the legislative jurisdiction of the Provincial legislature; for it was contended that a corporation created by it has not the *status* nor capacity to contract outside of provincial jurisdiction which a Dominion corporation possesses. There is no warrant for this contention. There is nothing in the B. N. A. Act, nor in the classes of subjects within their legislative authority, which would place these legislatures outside the definition given by writers on this subject:—"The colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, are sovereign within the limits of their respective territories:" 1 Story's Const § 171. "The legislative bodies in the dependencies of the Crown have *sub modo* the same powers of legislation as their prototype in England, subject, however, to the final negative of the sovereign:" 1 Broom's Com. 122.

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The term "incorporation of companies with Provincial objects" in the B. N. A. Act, (s. 92, subs. 11) defines the classes of corporations within the legislative authority of the Provinces; and its meaning must be gathered from analogous clauses empowering them to make laws in relation to "local works and undertakings," (subs. 10), and "matters of a merely local or private nature in the Province," (subs. 16), and under which it is obvious the legislatures may incorporate companies for like purposes. The term must be read to mean "local objects," in contradistinction to objects common to the Provinces in their collective or dominion quality, which are within Dominion jurisdiction.

The power to incorporate companies is incidental to a sovereignty, though such power may be delegated: "The king, it is said, may grant to a subject the power of erecting corporations, but it is really the king that erects, and the subject is but the instrument." 1 Bl. Com. 473. Corporations may be erected by charter or by "Act of Parliament, of which the Royal assent is a necessary ingredient." *Ibid.*

This assent of the Crown in connection with the Acts of the Provincial Legislatures has been questioned; and some warrant for this appears in the *obiter dicta* of some learned judges who say that Her Majesty forms no constituent part of the Provincial Legislatures as she does of the Dominion Parliament. This denial of the legislative prerogative of the Crown in Provincial legislation, touches the validity of all Provincial Acts since confederation, since the usual form of the Provincial statutes is "Her Majesty, by and with the advice, etc., enacts." "The legislative power," says Lord Hale, "is lodged in the king, with the assent of the Houses of Parliament:" 1 Hale's Juris. Ho. Lds. 406. "The making of statutes is by the king, with the assent of parliament:" 1 Whitelock's King's Writ, 406. "The king has the prerogative of giving his assent to such bills as his subjects legally convened present to him—that is, of giving them the force and sanction of a law:" Bacon's Abr. Tit. Prerog. 489. See also 4 Co. Inst. 24.

This is but the common law on the legislative prerogatives of the Crown. A reference to the Imperial Acts, which gave legislative institutions to this Province prior to the B. N. A. Act, will show that the Provincial laws of Upper Canada were to be made by "His Majesty, his heirs and

successors," (31 Geo. III. c. 31), and of Canada by "Her Majesty, her heirs or successors," (3 & 4 Vict. c. 35), by and with the advice and consent of the other legislative bodies; and the clauses of these Imperial Acts relating to the legislative prerogative of the Crown in this Province have not been repealed, but, on the contrary, are continued by s. 129 of the B. N. A. Act.

The question, however, appears to have been determined in 1876 by the Judicial Committee of the Privy Council, in *Theberge v. Laudry*, L. R. 2 App. Cas. 102,—which is binding on all our courts,—where Lord Cairns, L.C., referring to an Act of one of the Provincial legislatures then under review, held that it was an Act which had been assented to by the Crown, and to which the Crown therefore was a party: p. 108.

The B. N. A. Act created two separate and independent governments, with enumerated and therefore limited parliamentary powers. These dual governments take the place of and exercise the legislative and executive powers previously vested in one government; and although both exist within the same territorial limits, their powers are separate and distinct, and they act separately and independently of each other within their respective spheres. This view has been affirmed in our Provincial Courts. The case of *Re Goodhue*, 19 Gr. 366, decides that there is no limitation imposed on the Provincial legislatures as regards the extent to which they may affect private rights and matters of a merely local and private nature in the Province; and that as to such objects they can pass laws to the same unlimited extent that the Imperial Parliament may in the United Kingdom: p. 452. In *Reg. v. Hodge*, 7 App. R. 246, it was shown that the Dominion and Provincial legislatures derive their powers from the same source; and that "the power to make laws in relation to the several classes of subjects committed exclusively to the Provincial legislatures, is as large and complete as it is in the classes of subjects committed to the Dominion Parliament. The limits of the subjects of jurisdiction are prescribed, but within those limits, the authority to legislate is not limited:" p. 251.

These cases show that both the Dominion and the Provincial legislatures have plenary powers of legislation to the extent necessary for the efficient exercise of the exclusive legislative authority of each; and that they are therefore

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sovereignties within the definitions given in Story's Const. 171, *Phillips v. Eyre*, L. R. 6 Q.B. 20, and *Reg. v. Burah*, L. R. 3 App. Cas. 904. Each has authority to create corporations; and therefore a company incorporated by a Provincial legislature has for the purposes of its business the same attributes, franchises and powers within the jurisdiction creating it, as a company incorporated by the Imperial or the Dominion Parliament, and may transact its business outside the Province wherever, by comity or otherwise, its contracts may be recognized.

The power to transact insurance business outside the Provincial jurisdiction creating such corporations, is regulated in Canada by the Act 40 Vict. c. 42, s. 28, which provides that companies incorporated by a Provincial legislature for carrying on the business of insurance within a Province, may, under certain conditions, transact such business throughout Canada. And the case of *Citizens Ins. Co. v. Parsons*, L.R. 7 App. Cas. 115, defines the jurisdiction of the Provincial legislatures over Dominion companies.

As to the objection that these defendants have not obtained power in their Act of incorporation to transact insurance business in foreign countries, it may be answered that no legislature can confer upon corporations created by it the right to carry on business outside its territory. The legislative enactments of a country have no binding force *propria vigore* in other territorial sovereignties. Where, however, a legislature assumes to authorize its corporations to carry on business in foreign countries, such authority is no more than a legislative sanction of an agreement amongst the incorporators that their business may be carried on abroad as well as at home. It has been held by one of the Federal Courts of the United States that it is not competent for a State legislature to enact that its citizens shall not make such contracts as they please in respect of their business outside of the State: *Lamb v. Bowser*, 7 Biss. Cir. Ct. 315. Where there is no express provision in the charter of a corporation limiting its ordinary business to a particular place or territory, no such limitation can be implied: *Morawitz on Corp.* 502. And there is nothing in our law to prevent a corporation created here carrying on its business both at home and abroad in the same manner as an individual or a co-partnership engaged in a similar enterprise. The contract here sued

upon appears to have been within the corporate powers of these defendants; and the cases show that such a contract would be recognized as valid in a foreign country.

Corporations are defined to be mere artificial bodies—invisible and intangible—local inhabitants of the places of their creation; yet they are “persons” for certain purposes in contemplation of law, and as such are permitted by the comity of nations to make contracts in other states than the one creating them, and which would be valid if made in such state by natural persons not resident therein: *Bard v. Poole*, 12 N. Y. 495. Natural persons through the intervention of agents are continually making contracts in countries in which they do not reside; and there can be no objection to the capacity of an artificial person, by its agent making a contract within the scope of its limited powers in a country in which it does not reside. By the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts. “The public and well-known and long-continued usages of trade, and general acquiescence of states, all concur in proving the truth of this proposition:” *Bank of Augusta v. Earle* 13 Pet. 519. This comity is recognized in England; and a foreign corporation may carry on trade in London and be treated as if a resident there: *Newby v. Colt's Patent Firearms Co.*, L.R. 7 Q.B. 293. Similarly a foreign corporation may make contracts and carry on business in Ontario: *Howe Machine Co. v. Walker*, 35 U. C. R. 37. The locality of the forum determines whether a corporation is “foreign” or not. Thus a company incorporated by the Imperial Parliament for the purpose of building a railway in Scotland is a foreign corporation in England: *Mackereth v. Glasgow, etc., Ry. Co.*, L. R. 8 Ex. 149; although Scotland is not a foreign country to England: *Re Orr Ewing*, 22 Ch. D. 465. So an Irish railway company incorporated by the same Parliament is a foreign corporation in England, and may be compelled to give security for costs: *Kilkenny, etc., Ry. Co. v. Fielder*, 6 Exch. 81. And the Bank of Montreal is a foreign corporation in Upper Canada, (now Ontario): *Bank of Montreal v. Bethune*, 4 O.S. 341.

The defence raised by the non-payment of the premium brings up the question of the *lex loci contractus*, or whether the contract was made in

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Ontario or New York. This point was only slightly argued; but it is important, for by it must be determined the question of the defendants' liability. The pleadings raise the issue that a blank form of contract was sent by the defendants from Toronto to their agent in New York, with authority to make a contract and fill up the blanks in New York; but there is no evidence in support of this allegation. The only evidence in respect of this particular contract is that it was received from the defendants' agent in New York on the 7th or 8th August, and that on the 11th August the claimant's cheque for the premium, payable to the order of the defendants, was handed to the defendants' agent, and by him transmitted to the defendants at Toronto, who returned the same to the claimants on the 17th August, with a letter repudiating the liability. *

The right of the claimants depends upon the question by what law the contract is to be governed. This question is usually one of the intention of the parties; but in the absence of any indication of that intention, or of any special circumstances which would show that another place was to govern, it will ordinarily be held that the law of the place where the final assent is given by the party to whom the proposition is made, or where the company has been incorporated, will govern, especially if that be the place where the money is to be paid. But if no place is named for the payment of the money, or if the contract may be performed anywhere, then the law of the place where the contract was entered into; and this may further depend upon a consideration of the powers of the agent.

In *Parken v. Royal Exchange Assurance Co.*, 8 Sess. Cas. (Scot. 1846) 363, where an agent received an application for assurance, and forwarded it to the head office in London, and in due time received back a policy which he delivered to the insured at Edinburgh, and received from him the premium; it was held that the contract was made in England, and that it had no analogy to an order sent to London for goods to be delivered by the London house in Scotland. The court laid stress on this: that though no place of payment was in terms provided, England was in law that place. So in *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516. In that case the contract was made between the plaintiff and an agent of the company in the State of

Georgia. The plaintiff was a resident of that State; the defendants were incorporated and had their head office in New Jersey. The action was brought in one of the New York courts; and it was held that as no place of payment was mentioned it must be assumed that the payment was to be made in New Jersey, where the principal office of the company was situated, and that the contract must be governed by the law of the State of New Jersey. See also *McGivern v. James*, 33 U. C. R. 203.

Here the contract appears to have been executed in Toronto; and although no place of payment is mentioned it must be held that the payment of the insurance money, and therefore the performance of the contract, was to take place in Toronto. And there is nothing in the contract or in the evidence to show that its validity depended upon any special circumstances, or act to be done by the defendants' agent, which would bring it under the law of New York. This and the act of the claimants in making their cheque for the amount of the premium payable to the defendants and not to the agent are matters which affect the consideration of the question by what law the contract is to be governed. For these reasons it must be held that the contract in question is governed by the law of Ontario; and by that law the non-payment of the premium renders the contract incomplete; and this is a good defence to an action on a policy of insurance: *Walker v. Provincial Ins. Co.*, 7 Gr. 137, 8 Gr. 217, s. c. 5 U.C.L.J. 162.

After intimating to the parties my opinion as above, Mr. Falconbridge applied for leave to give further evidence to show that the policy in this case had been signed and sealed in blank by the defendants in Toronto, and forwarded to their agent in New York to be filled up and delivered to the claimants. This application was opposed by the defendants, but I stated I would consider whether such evidence if given would bring the contract under the law of New York. I think it would not. The agent in New York when filling up the blanks, was giving no greater validity to the contract than a clerk doing the same act in the head office; and such agent's act could only have relation to the act of the defendants in signing and sealing the policy in Toronto. The act of the claimants in making their cheque payable directly to the defendants and not to their agent also shows what was their view

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of the authority of the agent. But analogous cases respecting bills of exchange sustain this view. In *Snarth v. Mingay*, 1 M. & Sel. 87, a firm resident in Ireland signed, endorsed, and stamped four copperplate impressions of bills of exchange, dated from a place in Ireland, leaving blanks for dates, sums, times of payment and names of drawees, and transmitted them to their agent in London. The agent filled up the blanks and negotiated the bills. In an action for the recovery of the amounts of the bills it was contended that not having English stamps on them they were void; but the court held that they were to be considered bills of exchange made in Ireland by relation from the time of the signing and endorsing there, as if they had been drawn in all particulars with the firm's hand, and that they were governed by the law of that country; Bayley, J., observing that "the act which pledged the credit of the firm was their signature in Ireland."

So in *Lanning v. Ralson*, 23 Penn. 137, a merchant in Pennsylvania drew a bill of exchange, leaving blank the time for payment, and the names of payee and acceptor. The bill was sent to England to an agent of the drawer, who filled in the blanks and negotiated the bill with a bank there. The court held that the contract was made in Pennsylvania and was governed by the law of that State; Lewis, J., remarking that when the London bankers became holders of the bill "it bore the dress of a bill of exchange drawn in Pennsylvania." See also *Crutchly v. Mann*, 5 Taunt. 529; *Trimbey v. Vignier*, 1 Bing. N. C. 151.

CHANCERY DIVISION—PRACTICE.

RE BROWN, BROWN V. BROWN.

Administration—Commission in lieu of taxed costs—Chy. Ord. 643.

The commission in lieu of taxed costs under Ord. 643 is to be calculated on the gross amount accounted for by the accounting party, and not merely on the net amount found in his hands on the footing of the accounts.

[PROUDFOOT, J.—Oct. 24.]

This was an action for administration. By the report of the Master at Cornwall it appeared that the personal representative had received \$2,451.17, and had properly expended \$1,625.97, leaving a balance of \$825.20 in her hands.

The Master had fixed the commission in lieu of taxed costs, under Chy. Ord. 643, at the sum of \$188.53. The usual order was made for distribution in accordance with the report, but on an application for cheques being made to the Accountant, that officer doubted whether the Master had not erred in awarding the commission on \$2,451.17, instead of on the \$825.20, which he thought was "the amount realized in the suit," and by direction of the Chancellor he stayed the issuing of the cheques until the matter could again be mentioned to Proudfoot, J., by whom the order for distribution had been made.

The matter now came on accordingly. The following counsel appeared, viz.:

N. W. Hoyles, for adult defendant.

J. Hoskin, Q.C., for the infant defendants.

PROUDFOOT, J.—This matter has been mentioned to me by the Accountant, who referred me to the case of *Re McColl, McColl v. McColl*, 8 P. R. 480. I at first thought that the case was governed by that decision, but on further consideration I do not think that it is, and that the Master has properly allowed the commission on the gross amount accounted for in this action.

COUNTY JUDGE'S CRIMINAL COURT OF THE COUNTY OF ELGIN.

REGINA V TOPP.

Evidence—Abandonment and exposure whereby life is endangered—32-33 Vict. ch. 20, sec. 26.

The defendant was accused of abandoning and exposing her child of fourteen months old whereby its life was endangered. The child was left on the doorstep of her brother-in-law's house, about 8 o'clock p.m. This house was near a public street. The accused alleged that her brother-in-law was the father of the child. The evening was chilly but the child was properly clad, and its health did not seem to have been injured.

[St. Thomas, Oct. 30.]

Emma Topp was accused, under the foregoing statute, for that she did abandon and expose a certain child being under the age of two years, whereby the life of such child was endangered. It was proved that she was the mother of the child, about fourteen months old, which she left on the doorstep of her brother-in-law's dwelling about eight o'clock in the evening, when the weather was rather chilly. She had previously alleged that he had seduced her, and that the

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child was the offspring of that intercourse. The other facts appear in the judgment. On the proof of these facts at the trial it was objected for the prisoner that there was no evidence to go to a jury that the life of the child was *endangered*, and that there was no abandonment and no exposure of the child within the meaning of the statute.

The learned judge reserved judgment until the 30th October, 1883, on which day he delivered the following judgment :—

HUGHES, CO. J.—The defendant is accused of an offence under the Act respecting offences against the person, and it is alleged that she “did unlawfully abandon and expose a certain child, then being under the age of two years, whereby the life of the child was endangered.”

The Imperial Statute 24-25 Vict. cap. 100, s. 27, and our Dominion statute are in effect the same, although not identical in the verbal expression of the law.

The 26th section of our statute enacts that “whosoever unlawfully abandons or exposes any child under the age of two years, whereby the life of such child is endangered, or the health of such child has been or is likely to be permanently injured, is guilty of a misdemeanor, and shall be liable to be imprisoned in the penitentiary, etc.”

It is not alleged that by the act of the defendant, nor is it proved that the health of the child has been or is likely to be permanently injured. On the contrary, a perfectly healthy child is brought before the Court, which is proved to be the illegitimate offspring of the defendant, under two years of age, and which she endeavored to get the person whom she alleges to be its father, to take into his family and support, because of her own inability to maintain it any longer. After a fruitless effort to persuade him to take the child and provide for it, she left it on the door-step of his dwelling-house, near a public street or highway, at an hour in the evening when and where it would be almost certain to be found immediately, and taken care of. It was not left unclothed or entirely uncared for, for it had clothes and socks, but only one shoe on one of its feet ; it had also a cape or cloak wrapped around it, which kept it from cold, and it is not shown that it took cold or suffered in health in any respect, although the evening was chilly. There is no doubt whatever that her act

was an abandoning and exposing the child, but there is a total absence of proof that the health of the child suffered, much less that its life was endangered by this act. It is not like any of those cases of which we read, where the child has been left in a secret place, where it is not likely to be found for some hours ; or where it has been packed up in a hamper or basket, and either left at a door-step in an inclement season of the year, at an hour when all the inmates of the house are in bed, and it is not likely that people on the street will be passing to hear its cries, or that it has been sent away to a distant place by railway or other public mode of conveyance. I think if the child were left in such a situation from which there was a reasonable expectation that it would be taken in and cared for by some one else, and that its health and life were not thereby endangered, the offence is not complete.

The case *Queen v. Falkingham*, reported in 1 L. R. C. C. R. 222, was very different in its complexion from the present ; for there a very delicate infant, only five weeks old, put up in a hamper, wrapped up in a shawl and packed with shavings and cotton wool, was taken four or five miles to a booking office of a railway station, where the hamper was handed to a clerk with directions to be very careful of it, and to send it to “G.” by the next train, which would leave in ten minutes. Nothing was said to the clerk about the contents of the hamper, which was addressed to “Mr. Carr’s, Northoutgate, Gisbrow—with care, to be delivered immediately,” at which address the father of the child was then living. The hamper was carried by the ordinary passenger train from M. to G. at 7.45 p.m., and arrived at G. at 8.15 p.m. At 8.40 p.m. the hamper was delivered at its address. The child died three weeks after from causes not attributed to the conduct of the accused. The prisoner’s counsel objected, upon these facts proven, that there was no evidence to go to the jury that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were over-ruled and the case left to the jury, who found the accused guilty. On a case reserved, the question was whether or not the accused was rightly convicted. The Court were of opinion that the conviction should be affirmed. Doubtless the Court were moved to

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REGINA V. TOPP—RECENT ENGLISH PRACTICE CASES.

the conclusion reached from the peculiar circumstances of the case, although no reasons whatever were given for the judgment. They expressed the opinion that "under the circumstances," and as that was "the first case of the kind under the statute, that a lenient punishment ought to be inflicted." It has to be observed also with reference to that case, that no counsel appeared on the 13th November, 1869, when it should have been argued; that the Court, consisting of Kelly, C. B., Martin, B., and Blackburn, Lush, and Brett, JJ., reserved it for the consideration of the fifteen judges. On the 22nd January, 1870, counsel appeared to argue the case for the prosecution, but was not heard, as the Court, thinking that no counsel appeared, had already considered the case, and a majority of them had arrived at a conclusion in favour of the prosecution. The sending that infant in the hamper on that journey, totally unattended and uncared for, when the turning the hamper upon its end might have caused the whole of its weight to rest on its head; or the being carried with other parcels or hampers might have suffocated it for want of air, or other causes injurious to health, could only be regarded as endangering the life of the child.

I cannot say that the life of the child in this case was endangered, especially when I do not see that its health suffered. When a person leaves a child at the door of its putative father, *where it is likely, or almost certain, to be taken into the house immediately*, it would be too much to say that if death ensued it would be murder in the person who left it there. The probability there would be so great (almost amounting to a certainty) that the child would be found and taken care of, that *malice prepense*—the essential ingredient in an accusation for murder—could not be presumed. If, on the other hand, it were left in an unfrequented place, such as an abandoned or distant shed or stable or barn, the inference would be at once drawn that the party left it there in order that it might die.

Here the child was exposed near a public street, on the doorstep of a house, and at an hour when it would almost sure to be seen, and its cries heard, at an hour when and place where persons not only might pass, but were frequently passing. I think, therefore, a jury, if trying this case, might very fairly find that the important

constituent in the offence alleged in this indictment is wanting—which is, that the life of the child was endangered—especially in view of the fact that its *health* did not suffer in the least. Had it been alleged that its health was likely to have been permanently injured the case might have been different; but even that would be doubtful. The defendant is acquitted.

(See judgment of Coltman, J., in *Regina v. Walters*, 1 Car. & Mar. 170.)

RECENT ENGLISH PRACTICE CASES.

VIVIAN V. LITTLE.

Production—Inspection of documents.

[L. R. 11 Q. B. D. 370.

In an action of trespass to land brought against the committee of a lunatic whose title-deeds are in the custody of the court having jurisdiction in lunacy, an order on the defendant for inspection of the documents ought not to be made, as they are not in his possession or control.

IN RE BRADFORD, THURSBY AND FARISTS.

Imp. Jud. Act, 1873, sec. 49—Ont. Jud. Act, sec. 32.

Costs—Order on solicitor personally to pay—Appeal.

[L. R. 11 Q. B. D. 373.

An order that the costs of an application at Chambers on behalf of a client shall be paid by his solicitor personally, is within the above section, and therefore not subject to any appeal except by leave.

LOPES, J.—It is said that this is not a true construction of sec. 49 (Ont. sec. 32), and that the Legislature intended to deal only with costs as between party and party. I cannot put such a limited construction on the words.

POLLOCK, B.—The Master had power to make the order as to costs, for he had the same power as a Judge in Chambers, and a Judge in Chambers has the same power as the Court, and the Court has power to exercise its jurisdiction over its officers, and to order that costs shall be paid by them personally . . . I have no doubt that the present is a case in which the discretion of the Master and of the learned

Judge was exercised under the general principle by which the question of costs and the distribution of costs is by law left to the discretion of the Court, and, therefore, that in this case there is no appeal.

MUNSTER V. RAILTON & Co.

Imp. O. 12, r. 12, O. 42, r. 8—Ont. rr. 57, 346.

Action against partners in firm name—Amendment of judgment.

[C. A., L. R. 11 Q. B. D. 435.]

The plaintiff issued a writ against the firm of R. & Co., R. only appeared to the writ, and the plaintiff delivered statement of claim against "R., sued as R. & Co." Issue having been joined, the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R., sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it in accordance with the writ, a judgment against the firm of R. & Co.

Held, that the amendment ought not to be allowed, for the plaintiff, although he acted in ignorance of the facts, must be taken to have elected to sue R. alone, and was concluded by the form of the proceedings subsequent to the appearance.

Judgment of the Queen's Bench Division (L. R. 10 Q. B. D. 475) reversed.

Per BOWEN, L. J.—The plaintiff's proper course would have been to apply to set aside all proceedings subsequent to the action, when he departed from the ordinary mode of prosecuting an action against a firm; but he has not asked for this, and instead of it he asks that the judgment may be amended without amending the pleadings. I think that we should be defeating the substantial forms of justice if we were to accede to this application.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

[Oct. 27.]

RE DONOVAN—WILSON V. BEATTY, AND
HALDEN V. BEATTY.

Solicitor and client—Administrator ad litem—Order to refund costs.

The order of Proudfoot J. (29 Gr. 280) reversed on appeal [Spragge, C. J. O., dissenting,] the court being of opinion that the taxations of the bills of costs referred to in the petitions, and all the other proceedings in reference thereto, having been taken in the absence of the solicitor, he could not be bound thereby, and the order under which the money had been directed to be repaid by Donovan was set aside with costs.

The appellant (Donovan) in person.

MacLennan, Q. C., Moss, Q. C., O'Donohue, Q. C., and Morphy for the respondents.

Foy, for the plaintiff Wilson, in the Court below.

[Oct. 27]

RE WEST SIMCOE ELECTION.

Corrupt practices—Acts of agents.

One H., a tavern-keeper within the electoral division had been appointed a delegate to the convention at which he attended, and at which the respondent P. had been nominated as a candidate for the constituency, when P. addressed the convention, calling upon his supporters to use their best exertions in securing his return.

On election day H., whose house was distant about a mile from a polling booth, was proved to have kept his bar open during the hours of polling, and treated a voter, whom he called into the tavern on passing :

Held, [BURTON, J. A., dissenting] that this was such a corrupt practice of an agent as voided the election.

Bethune, Q. C., S. H. Blake, Q. C., Lount, Q. C. and Johnson for the appellant.

McCarthy, Q. C., for the respondent (the petitioner.)

QUEEN'S BENCH DIVISION.

REGINA V. MCELLIGOTT.

Conviction—Assault—Stopping carriage.

A conviction for standing in front of the horses and carriage driven by V. in a hostile manner, and thereby forcibly detaining the said V. in the public highway against his will, was

Held, bad in stating the detention as a conclusion and not as parcel of the charge.

FARMER V. TRIBUNE PRINTING CO.

Libel—Newspaper—Justification.

To a statement of claim charging the defendants with publishing of the plaintiff that he had seduced B. P., whereby &c., the defendants pleaded that the article was published bona fide and without malice, and for the public benefit and in the usual course of business as journalists, and was a correct, fair and honest report of proceedings of public interest.

Held, bad on demurrer.

CHANCERY DIVISION.

Hagarty, C. J.]

[Oct. 23]

GRAHAM V. ROSS.

Mortgage—Covenant—Forfeiture.

Defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in equal annual instalments, and also to build a good log house on the land mortgaged within one year from the date of the mortgage, and there was a proviso that on breach of this covenant the mortgage should immediately become due and payable.

No default occurred in payment of the mortgage money, but the log house was not built within the year as covenanted.

Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure.

Relief is given against forfeitures for non-payment of rent, and in certain cases for neglecting

to insure, but no case appears in which default like the present has been relieved against.

Semble, that it is now clear in this Province that equity will not relieve against a proviso in a mortgage that on default of payment of a part of the debt the whole shall become due.

Osler, J.]

[Nov. 2.]

FERRIS V. FERRIS.

Action for alimony—Desertion—Pleading.

Action for alimony. In his defence the defendant alleged "that prior to the commencement of this suit, and still, he refuses to support the plaintiff by reason of her having committed, as in fact she did, adultery with M." It appeared at the trial that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, after having been forbidden to do so. At the trial, also, the defendant persisted in the charge of adultery, but failed to prove it, and indeed offered no evidence of it.

Held, that these statements in the defendant's defence, taken in connection with these facts, must be treated as sufficient proof of desertion on his part, and he must be taken to have dispensed with the necessity of the plaintiff making an offer to return.

Proudfoot, J.]

[Nov. 7.]

ARMSTRONG V. FORSTER.

Insolvent Act of 1875—Bond of official assignee—Official assignee subsequently made creditors' assignee.

Held, on demurrer to the statement of defence in this action, that where an official assignee has given a bond as such, with sureties, pursuant to the Insolvent Act of 1875 and the amending acts, and the creditors have duly appointed the same individual to be creditors' assignee, under sec. 29 of the said Insolvent Act of 1875, but have not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee, remained liable for his dealings with the estate, and were not discharged by virtue of such appointment as creditors' assignee.

The appointment by the creditors cast no additional or increased risk upon the sureties beyond what they would have incurred without the appointment. The official assignee, in case of no appointment by the creditors, has all the powers of a creditors' assignee, and is liable to be removed by the creditors. He did not owe a divided duty, nor was he subject to another's control. The appointment by the creditors made no change in these respects, and it must have been in the contemplation of the sureties that he might have the whole administration of the estate; and it does not matter whether he performed that duty under the one or the other appointment.

Gibbons for the demurrer.

Jacob, contra.

Proudfoot, J.]

[Nov. 7.]

McFARREN V. JOHNSON.

Specific performance — Contract contained in letters—"Coming to accept."

Action for specific performance of an alleged contract for the purchase of land.

On May 30th, 1883, the plaintiff wrote, offering to give \$1500 for the land in question, which contained frontage of about 50 feet.

On June 19th the defendant replied that he was willing to take the \$1500 for 35 feet of the frontage. On June 25th the defendant telegraphed: "Coming Monday to accept \$1500. Waiting immediate reply."

On same day plaintiff telegraphed, "Come at once."

Held, that the above did not constitute a completed contract for the sale of the 50 feet frontage for \$1500. It was ambiguous which proposal of \$1500 the telegram from the defendant of June 25th referred to, and the words "waiting immediate reply" seemed to shew the reference was to the offer made by himself. But apart from this, the words "coming to accept" did not show an acceptance; it only showed an intention to do something.

McMichael, Q.C., for the plaintiff.

Rose, Q.C., for the defendant.

Proudfoot, J.]

[Nov. 14.]

RE LEA AND THE ONTARIO AND QUEBEC RY. CO.

Dominion Railway Act, 1879—Appeal from award—Constitutional law—Jurisdiction—Changing petition into action—Practice—R. S. O. c. 165.

This was a petition by way of appeal from the award of arbitrators appointed under the Dominion Railway Act, 1879. The submission had not been made a rule of court. No special mode is provided under the said Dominion Railway Act for appealing from such an award.

Held, under these circumstances, that the only mode of impeaching the award was by an action to set it aside, or to make the submission a rule of court and then move to set it aside, and the petition must be dismissed, though without costs.

The appeal given by R. S. O. c. 165, s. 20, ss. 19, only applies to railways over which the Provincial Legislature has jurisdiction, and is not available in such a case as this; and it is not correct to say that an appeal from an award of this nature is simply a matter of procedure in a civil matter, and so within the powers of the Local Legislature under B. N. A. Act, s. 92, and that R. S. O. c. 165, s. 20, ss. 19, gives a summary appeal applicable to all cases of awards under the Railway Acts, whether of the Dominion or the Province, R. S. O. c. 165, all its provisions are expressly limited to railways under local jurisdiction, and assuming that the appeal in such cases as the present is a matter of procedure, and within the jurisdiction of the local legislature, the power to legislate upon it has not been exercised so as to apply to any other than local roads.

Semble, the Court has no power to turn such a petition as the present into an action.

Rose, Q.C., for the petition.

Cameron, Q.C., contra.

PRACTICE.

Wilson, C. J. C. P. D.]

[Oct. 10.]

MORTON V. GRAND TRUNK RY. CO.

Cost—Entry and record—Clerk's fees.

Held, on appeal from the taxing office at Toronto, that Clerks of Assize, when the trial of

a case is postponed from one Assize to another by order of Judge at Assize, have no right to levy the fee for certifying record and the entry and jury fees over again, the former payment holding good.

The D. C. C. at St. Thomas, as Clerk of Assize, had done this and had afterwards allowed the amount to the plaintiff, who had been successful in the action on the taxation of his costs. On revision, the taxing officer at Toronto taxed the amount off, and this decision was upheld on appeal by Wilson, C. J.

In this case an order had been made by the Master in Chambers, on an application to postpone the trial, when the trial was coming on for the second time, that the case should be entered at the foot of the list, in order that the plaintiff might be examined, but it was here held that that did not necessitate a re-entry of the case, and that the case once entered remained entered on the list until it was tried, struck out or withdrawn.

Dickson for appeal.

Aylesworth, contra.

Wilson, C. J.]

[Oct. 26]

KERSTEMAN V. MCLELLAN.

Capias—Foreign residence of defendant—Temporary return to jurisdiction.

Motion to set aside the writ of *capias* and all proceedings &c., or to discharge the defendant from custody on the ground that the defendant was, at the time of his arrest, domiciled in and a resident of the state of Michigan, U. S., and was within the jurisdiction of this Court for a temporary purpose only.

The defendant (a British subject) absconded from this Province with the intention of defrauding his creditors in July, 1882, and after having gone to the United States took means to become a citizen of that country, but returned to this Province more than once for a temporary purpose, and on one of these occasions was arrested under the *capias* issued in this action.

Held, that it is of no moment where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he come to this Province, and reside here, and contract debts, and is about to quit the country (that is in fact to change his residence to a foreign country, even although that country be

his place of domicile) with the intent to defraud his creditors, he is subject to the law of arrest as it prevails in that Province.

Held, that taking steps to become a citizen of a foreign country may change the domicile but not the residence.

Held, that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this Province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest.

Bain, Gordon & Shepley, for the defendant.

S. G. Wood, for the plaintiff.

BOOK REVIEW.

A PRACTICAL TREATISE ON THE LAW OF ABSCONDING DEBTORS, as administered in the Province of Ontario, with a large number of Forms of proceedings that will be found useful and convenient in the practical application of the Absconding Debtor's Act, by James Shaw Sinclair, Q. C., Judge of the County Court, and Local Judge of the High Court of Justice, Toronto: Carswell & Co., publishers.

We have received a copy of the above work with a feeling of pleasure at a useful addition to the rapidly increasing number of our text books. These annotated editions of our Statutes are a very valuable form of legal literature, not only on account of their individual merits, but also because successive consolidations of the statutes, and the fact that we do not at present possess any tabulated index to cases illustrating the very enactments of our Statute law, render it by no means easy to hunt up the cases bearing on any special section which may be under investigation. The present work is admirably printed and arranged, and the learned author alleges, as we see no reason to doubt, that he has endeavored to collect and bring before the reader not only every reported case in our own courts, but also many American decisions under similar statutes. We also notice a great number of references to English decisions. In his Preface his Honor points out that the Absconding Debtor's Act may be said to be *redivivus*, by reason of the repeal of the Insolvent Acts in 1880, for that "it is the only statute we have, under which an equal distribution of a debtor's property may in certain

CORRESPONDENCE—ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

cases be obtained." A very little enquiry at Osgoode Hall shows that the Absconding Debtor's Act is now, as one practitioner expressed it, "in full blast," though if the reasoning in the preface be correct the Act will soon be less used, as there is every prospect of a new insolvency law next session.

THE LAW AND PRACTICE relating to the administration of the estates of deceased persons by the Chancery Division of the High Court of Justice. By Walker and Elgood. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1883.

This book was planned and commenced by Mr. Walker as a companion volume to his "Compendium of the law of Executors and Administrators," and completed by Mr. Elgood. It is a very useful and handy book of the practice on the subject. It does not strike us so much as a book for students, but for practical purposes it will be of much value even in this country. The index is good and the table of case elaborate.

CORRESPONDENCE.

To the Editor of the LAW JOURNAL.

SIR,—I notice the following language in the report of Lord Coleridge's speech at New York on the 11th ult.: "I am one of those who never have shrunk, and do not now shrink from calling themselves Radicals. I am one who, although I admire heartily Mr. Gladstone and support him to the best of my ability, yet find myself more commonly in agreement in political matters with Mr. Bright than with any other living politician."

I have heard surprise expressed by several at these remarks. It is generally supposed that when a man goes on the Bench he leaves politics behind him. It does not seem to me desirable that a judge should have, or at all events appear to have any political views. If he has it is generally thought that he should keep his views to himself. There may be some difference between the position of the Chief Justice of England and any other Judge in this respect, but in principle I can see none. The above remarks seem to me likely to be mischievous and should not pass unchallenged.

Yours, &c.,
BARRISTER.

ARTICLES OF INTEREST IN COTEMPORARY JOURNALS.

The presumption of knowledge.—*Albany L. J.*, July 19.

Common words and phrases—(Printed and published—Left unoccupied—Connected with the use and operation of the railway—At—Commodities—Common schools—Saloon—Law—On.)—*Ib.* July 21.

(Side—Spirituuous liquors—Capital—Author—Gulf of Mexico—Furniture.)—*Ib.* Sept. 8.

(Front of one acre—Fraud—Spirituuous liquors—Used with a view to profit.)—*Ib.*

Element of intention in conversion.—*Ib.* Aug. 11.

Dissection and resurrection.—*Ib.*

Oral license to plow land.—*Ib.* Aug. 25.

Abatement of public nuisance—Dwelling house.

—*Ib.* Sept. 29.

Action for malicious prosecution of a mere suit.—*Ib.* Oct. 20.

Slander and special damage.—*Justice of the Peace.*

The measure of interest—(Conflict of laws—Rate after maturity—Rate after judgment—Interest upon interest—Loss and suspension of interest—Change of law.)—*Central L. J.* Aug. 17.

Survival of assignment of actions.—*Ib.* May 24.

Stipulation to pay exchange in negotiable paper.—*Ib.*

Garnisheement—Funds in the hands of an administrator.—*Ib.* Aug. 31.

Conditions in conveyances.—*Ib.* Sept. 7.

Liability of joint promisors as affected by payment made by some of them.—*Ib.* Sept. 14.

Corporations—Power of expulsion.—*Ib.*

Chattel mortgage—Stock in trade—Right of mortgagee to sell and re-invest under the mortgage.—*Ib.* Sept. 21.

Stipulation in a note to pay attorney's fee—Control of court over.—*Ib.* Sept. 28—Oct. 12.

Imputable negligence.—*Ib.*

Assignment of bills and notes by delivery—Liability of transferor when same fictitious, forged or altered.—*Ib.* Oct. 12.

The third party under the new rules.—*London L. J.*, Aug. 11.

The effect of the new rules upon libel and slander.—*Ib.* Sept. 1

Construction of a statute by reference to the proceedings in parliament.—*Ib.* Sept. 15.

Cases on the Women's property Act.—*Law Times.*

Assaults on constables in execution of their duty.—*Ib.*

The right to the custody of children.—*Irish Law Times*, Aug. 11 *et seq.*

The burial laws.—*Times.*

Subsidence of land.—*Justice of the Peace.*

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely :—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creaser, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewar, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Huycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesley Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesley Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely :—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows:—Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects :—

Articled Clerks.

From	{ Arithmetic.
1883	{ Euclid, Bb. I., II., and III.
to	{ English Grammar and Composition.
1885.	{ English History Queen Anne to George III.
	{ Modern Geography, N. America and Europe.
	{ Elements of Book-keeping.

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. VI.
	{ Caesar, Bellum Britannicum.
	{ Cicero, Pro Archia.
1884.	{ Virgil, Æneid, B. V., vv. 1-361.
	{ Ovid, Heroides, Epistles, V. XIII.
	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. V., vv. 1-361.
1885.	{ Ovid, Fasti, B. I., vv. 1-300.
	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. IV.
	{ Xenophon, Anabasis, B. V.
1885.	{ Homer, Iliad, B. IV.
	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. I., vv. 1-304.
	{ Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem :—

1883—Marmion, with special reference to Canto V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

LAW SOCIETY.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the Death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1883 { Emile de Bonnechose, 1884 { Souvestre, Un
1885 { Lazare Hoche. 1884 { philosophe
sous les toits.

OR, NATURAL PHILOSOPHY.

Books—Arnett's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed within four years of his application an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be) upon giving the prescribed notice, and paying the prescribed fee.

From and after January 1st, 1883, the following books and subjects will be examined on:

FIRST INTERMEDIATE.

Williams' Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 117, Revised Statutes of Ontario and Amending Acts.

Three Scholarships can be competed for in connection with this intermediate.

SECOND INTERMEDIATE.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, Wills; Snell's Equity; Broom's Common Law; Williams' Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three Scholarships can be competed for in connection with this intermediate.

FOR CERTIFICATE OF FITNESS.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkin's on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

FOR CALL.

Blackstone, vol. 1, containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills; the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Law Society Terms begin as follows:—

Hilary Term, first Monday in February.

Easter Term, third Monday in May.

Trinity Term, first Monday in September.

Michaelmas Term, third Monday in November.

The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

Graduates and Matriculants of Universities will present their Diplomas or Certificates at 11 a.m. on the third Thursday before these Terms.

The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m.

The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m.; the Solicitors Examination on the Tuesday, and the Barristers on the Wednesday before Term.

The First Intermediate Examination must be passed in the Third Year, and the Second Intermediate Examination in the Second Year before the Final Examination, and one year must elapse between each Examination, and between the Second Intermediate and the Final, except under special circumstances.

Service under articles is effectual only after the Primary Examination has been passed.

Articles and assignments must be filed within three months from date of execution, otherwise term of service will date from date of filing.

Full term of five years, or, in case of Graduates, of three years, under articles must be served before Certificate of Fitness can be granted.

Candidates for Call to the Bar must give notice signed by a Benchor during the preceding term, and deposit fees and papers fourteen days before term.

Candidates for Certificate of Fitness are required to deposit fees and papers on or before the third Saturday before term.

FEES.

Notice Fees.....	\$ 1 00
Student's Admission Fee.....	50 00
Articled Clerk's Fee.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " ".....	100 00
Intermediate Fee.....	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions.....	2 00
" Diplomas.....	2 00
" Certificate of Admission.....	1 00
All other Certificates.....	1 00

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Canada Law Journal.

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No. 20.

DIARY FOR DECEMBER.

- 2 Sun... *Advent Sunday.*
- 4 Tues.... County Court sittings for York begin. Armour,
J., sworn in Q. B. 1877.
- 6 Thurs... Rehearing in Chy. begins.
- 8 Sat.... Michaelmas Sittings end.
- 9 Sun... *2nd Sunday in Advent.*
- 11 Tues... County Court sittings (except York) begin. Blake,
V. C., sworn in, 1872.

TORONTO, DEC. 1, 1883.

WE shall, if possible, issue the index for the present volume, and sheet Almanac for 1884, with our next number. Press of matter compels us to hold over some leading articles and other original contributions until the first number of the coming year.

THE case of *Garrett v. Roberts*, decided in the County Court of Northumberland and Durham, seems likely to become a leading case on the question whether a guilty mind is necessary to make an officer under the Election Act liable to the penalty there stated for omitting to perform the obligations specified in the statute. In this case the learned judge of the County Court decided that the officer was liable for the penalty, although he believed at the time he was acting properly. The counsel for the defendant contended that the penalty was in the nature of a punishment. The defendant ought not to be liable unless he intended to do wrong. The case has been carried to the Court of Appeal, but it will nevertheless be useful to give the judgment *in extenso* as we now do in another place.

WE would commend the following effort on the part of a country conveyancer to the

notice of the Attorney-General. If the public can stand this sort of thing of course the legal profession can. The latter think they are entitled to protection as professional men in the same way as every other profession, and to the same extent as the legal fraternity has in almost every other country. But there seems to be a power behind the throne which prevents justice being done in the premises, so far as this country is concerned, and no government seems to be strong enough to "do right and fear not."

The facts in the case we are referred were that a married woman, owner in fee, sold her land, and this is the way the conveyancer drew "the writins:"—"The married woman of the first part; the purchaser of the second part; the husband of the third part." After filling up the usual blanks in the form, whereby the party of the first part conveyed to the party of the second part, the deed concludes, "and the party of the third part, husband of of the party of the first part, hereby bars his dower in the said lands." There is a beautiful simplicity in this document which perhaps may furnish a suggestion to the association for the establishing of the Torrens System in this country.

RECENT JUDICIAL APPOINTMENTS.

THE appointment of Mr. Justice Osler to the Court of Appeal to fill the seat created by the late Act, and the elevation of Mr. J. E. Rose, Q.C., to the place thus rendered vacant in the Common Pleas Division, have given general satisfaction to the public, and have been well received by the profession. Mr. Rose is known to be a sound lawyer, quick,

RECENT JUDICIAL APPOINTMENTS—NOVEL METHOD OF PLEADING.

industrious, clear headed, courteous in manner, and fond of his profession. He has not had, as compared with many now at the Bar, a large counsel business; but this was only a question of time, we believe, with Mr. Rose, and like many others who have gained their experience largely on the Bench, he will, we doubt not, fully justify the confidence reposed in him.

The standing of Mr. Justice Osler at the Bar was, when appointed to the Pleas, not dissimilar in kind to that of Mr. Rose—neither having large experience as leading counsel. Every word of commendation then spoken of Mr. Osler has since been more than warranted by the result. His appointment to the Court of Appeal will strengthen a court, which cannot be said to be in as satisfactory a state as a lover of his country could wish. The fact is the court, when reorganized some years ago, was organized on an entirely false principle, as we then pointed out. Without the slightest disparagement to those learned members of the court who were then appointed, it is increasingly manifest that a Court of Appeal should mainly be filled by the best available *judicial* talent; it should be a place where judges who have shown their judicial capacity as either chiefs or puisnes in the courts below, and desire less active work, can, if still of sufficient mental vigour, find work to do of a nature more congenial to their advancing years. Under the present system the judges of the Court of Appeal are sorts of "maids of all work." It is absurd that the highest Court of Appeal in the Province should spend its time in County Court and Division Court cases. The whole thing is wrong in principle, contrary to precedent, and injurious to the public interests. The subject, however, merits further and fuller discussion than we can give it at present. We may return to it hereafter.

NOVEL METHOD OF PLEADING.

IN the case of *Ross v. Hunter*, 7 S. C. R. 289, a somewhat novel method of pleading appears to have been adopted. Upon the appeal coming on for argument it was pointed out that a replication setting up the Registry Laws was not upon the record, and it was agreed by counsel that the pleadings should be amended by adding a replication. It appears that there were more pleas than one to which this replication was necessary, but the pleader growing weary, we presume, with the labour of writing out his replication once, appended to it a note in the following terms:—"The same matter is to be *considered* as replied to the 8th plea in addition to the replications already pleaded, and as a part of such replications." Upon which Mr. Justice Gwynne observes:—"I stop not now to enquire whether the brevity which is so conspicuous in this mode of replying to the 8th plea has so much merit in it as to justify us in adopting this novel and unprecedented form upon a document which is intended to be preserved as a record of the issues joined between the parties upon which the court pronounces judgment in favour of one or other of the parties, and which being so preserved might be regarded as establishing a precedent for this concise method of pleading to be followed in other cases." "Brevity is the soul of wit," and the majority of the court, influenced no doubt by that maxim, suffered the pleading to pass. No doubt if the pleading had commenced "for a replication to the 7th and 8th pleas," it would have been perfectly good. The note at the foot, after all, is merely introducing into the tail, what Mr. Justice Gwynne, having regard to established precedents, thought should be in the head.

The case, however, presents another point of wider interest in that it establishes that a person purchasing land which is subject to an easement existing under an unregistered deed

ASSIGNMENT OF LIFE POLICY.

of which he has no actual notice, is not bound thereby, notwithstanding the particular easement may consist of some erection upon the land in question, which, upon close inspection is visible to the eye—provided he has not in fact actually observed it before he completes his purchase.

SELECTIONS.

ASSIGNMENT OF POLICY ON LIFE OF ASSIGNOR.

The question whether one who has insured his own life may make a valid assignment of the policy to another who has no interest in his life, as relative or creditor, is a vexed one.

The courts of New York, Vermont and Rhode Island hold the affirmative, those of Indiana, Pennsylvania, Kentucky, Massachusetts, Kansas, and the United States Supreme Court hold the negative.

The court said in *St. John v. American Mutual Life Insurance Co.*, 13 N. Y. 31: I am not aware of any principle of law that distinguishes contracts of insurance upon lives from other ordinary contracts, or that takes them out of the operation of the same legal rules which are applied to and govern such contracts. Policies of insurance are choses in action; they are governed by the same principles applicable to other agreements involving pecuniary obligations. * * * I do not agree with the counsel of the defendant that the assignee must have an insurable interest in the life of the assured in order to entitle him to recover the amount of the insurance. If the policies were valid in their inception, the assignment of them to the plaintiff did not change the liability of the company." Citing *Ashley v. Ashley*, 3 Sim. 149. This was followed in *Valton v. National Fund Life Ass. Co.*, 20 N. Y. 32.

So in *Clark v. Allen*, 11 R. I. 439; S. C., 23 Am. Rep. 496, it is said: "A life policy is a chose in action, a species of property which the holder may have perfectly good and innocent reasons for wishing to dispose of. He should be allowed to do so unless the law clearly forbids it. * * * We should have strong reasons before we hold that a man should not dispose of his own." As to the point of the wager, it is said: "But the wager was made when the policy was ef-

fected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from a holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is where a man takes a transfer of an annuity, or buys a life estate, or an estate in remainder after a life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void upon that account.

In *Fairchild v. North-Eastern Mutual Life Association*, 51 Vt. 613, the court briefly follow the New York and Rhode Island cases, and disapprove the Indiana and Kansas cases.

On the other hand, in *Franklin Fire Ins. Co. v. Hazzard*, 14 Ind. 116; S. C., 13 Am. Rep. 313, the court says: "Now if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon what principle can he purchase such policy from another? If he purchases a policy as a mere speculation, on the life of another in whose life he has no insurable interest, the door is open to the same 'demoralizing system of gaming,' and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him by the underwriters." Disapproving the New York cases, and citing *Stevens v. Warren*, 101 Mass. 564. Followed in *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

In *Stevens v. Warren*, 101 Mass. 564, it is said: "The rule against gambling policies would be completely evaded, if the court were to give such transfers the effect of equitable assignments," etc.

In *Life Ins. Co. v. Sturges*, 18 Kan. 93; S. C., 26 Am. Rep. 761, the same doctrine was held. The court said: "How can such a state of things be tolerated by the laws of any civilized country? * * * Of all wagering contracts, those concerning the lives of human beings should receive the strongest, the most emphatic, and the most persistent condemnation. * * * If said assignment from Haynes to Sturges were to be upheld, as valid under the law, it would be virtually saying that the law authorizes mere wagering speculations, mere mercenary traffic, concerning human life, and it would be opening the door wide, and inviting to enter the most shocking of all human crimes. * * *

ASSIGNMENT OF LIFE POLICY.

Such a thing would be most clearly against the most obvious rules of public policy, and therefore not to be tolerated by law." Citing the Illinois and Indiana, and disapproving the New York and Rhode Island cases.

In *Warnock v. Davis*, 104 U. S. 775, the court said: "The assignment of a policy to a party, not having an insurable interest, is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy, beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could in consideration of paying the premiums and assessments upon it, and the promise to pay, upon the death of the assured, a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money. * * * But if there be any sound reason for holding a policy invalid, when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he had no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those more fully in accord with the general policy of the law against speculative contracts upon human life." Approving the Indiana and Massachusetts, and disapproving the New York cases.

This was followed in *Bayse v. Adams*, Kentucky Court of Appeals, June, 1883, where it was said: "We are unable to see why the rule recognized by all the authorities as applicable to, and which renders invalid, because against public policy, policies of life insurance taken for the benefit of a party having no insurable interest in the life of the person in whose name it is insured, should not be also applied to assignment of a policy where the assignee has no such insurable interest. * * * It is not a sufficient answer to say that the policy was valid when issued. For if a person may purchase a policy on the life of another, in whose life he has no interest, as a mere speculation, the door is open to the same practice of gambling and

the same temptation is held out to the purchaser of the policy to bring about the event insured against, as if the policy had been issued directly. It is in fact an attempt to do indirectly what the law will not permit to be done directly."

The same doctrine is held in the most recent case, *Gilbert v. Moose's Administrators*, Pennsylvania Supreme Court, May, 1883. Moose insured his life for the benefit of Jacobs, who had no interest in his life. Jacobs assigned the policy during Moose's life to Gilbert, who on Moose's death collected the money from the company. Held, that Moose's administrator might recover it from Gilbert. The court said: "The sole inquiry then is, to whom do the proceeds belong? Was the court right in holding that they could not go to Jacobs, the beneficiary named in the certificate, or to the defendant, his assignee, because of their want of interest in the assured life? If so, judgment was properly entered for the plaintiffs, for in that case the beneficial interest in the risk remained in Jacob Moose and the representatives of his estate. We do not overlook the fact that the status of Jacobs is the point of this case, for if he was the proper and lawful beneficiary, then even were Gilbert without right, the plaintiffs could not recover, for the proceeds of the policy would belong to Jacobs, and on the other hand, if his claim was not good, he had nothing to assign to the defendant. But as a beneficiary merely, having no interest in the life, it seems to us very clear that he could lawfully have no interest in the policy. For if we admit the contrary, if we admit that one man can insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board. The very foundation of that doctrine is that no one shall have a beneficial interest of any kind in a life policy who is not presumed to be interested in the preservation of the life insured. But in the case supposed the presumption is inverted: the beneficiary is directly interested in the death of the assured. Moreover if such a transaction were permitted, the wager could always be concealed under the mere form of the policy. * * * No semblance of authority from either Pennsylvania or Federal courts has been adduced in support of the position assumed for the plaintiff in error, except a dictum of Judge Sharswood, then president of the District Court of Philadelphia, in the case of *Insurance Co. v. Robertshaw*, 2

Cc, Ct.]

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Cas 189. Not only is the case itself very far from being in point, but even the language cited was intended to have no application to a case like that in controversy. The position assumed by the learned judge is, that where a policy is *bona fide* and founded upon an insurable interest, the assignment or a gift of it to a friend or other person is no fraud upon the insurance company by which it was issued. This however is a position not controverted in the suit now under consideration. Therefore admitting this dictum to be authority in a case proper for its application, it is certainly not so in the case at hand." The court then review the Rhode Island and Federal cases, not citing any others, and conclude: "These authorities, in connection with our own, remove all hesitation concerning the rectitude of the judgment of the court below. If however the question were one of first impression, and to be settled on the ground of public morality and judicial policy, we could hardly fail to reach the same conclusion. So fraught with dishonesty and disaster, and so dangerous even to human life has this life insurance gambling become, that its toleration in a court of justice ought not for one moment to be thought of."

There is however a line of cases, even in Massachusetts and Indiana, holding that one may insure his life, and in the policy direct the proceeds to be paid to another having no interest in his life, and that the beneficiary under such a policy will take. For example, in *Lemon v. Phoenix Mutual Life Ins. Co.*, 28 Conn. 294, the court said: "Surely Mr. Peterson had an insurable interest in his own life, and he obtained the insurance on it; and we know of no law to prevent him from making the policy payable in case of his death to the person to whom he was affianced; and if such policy is delivered as a gift to the party to whom payable, we know no law to prevent such gift from being effectual. In *Rawles v. American Life Ins. Co.*, 27 N. Y. 282, Judge Wright says: 'If the contract is with the party whose life is insured, he may have the loss payable to his own representatives, or his assignee or appointee.'" To the same effect *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; *Providence Life Ins. and Investment Co. v. Baum*, 29 Ind. 236; *Langdon v. Union Mutual Life Ins. Co.*, 14 Fed. Rep. 272. This latter doctrine is denied in the Pennsylvania case, and that case has at least the merit of consistency. It is difficult

to see the distinction between appointment and assignment. If it is impolitic and dangerous to allow a man who has insured his own life to assign the policy to another who has no interest in his life, it must be equally impolitic and dangerous to allow the insured to effect the same purpose by appointing the same person beneficiary in the policy. There is the same want of interest and the same inducement to make the policy available by killing the insured.

The weight of authority is unquestionably in the negative of the question, but we think the better reason is with the affirmative.

—*Albany L. J.*

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

GARRETT V. ROBERTS.

Dominion Election Act—Refusal of returning officer to receive good vote—Penalty.

At an election for the House of Commons one S., a tenant, tendered his vote; some one present asserted that his tenancy had ended, and without further enquiry the returning officer assumed that to be true, and refused the vote, unless the voter should take the oath to the effect that he had not left the electoral district, as required from tenants whose tenancy had ended. As a fact it had not ended, and S. being improperly deprived of his vote, it was

Held, that the returning officer was liable to the penalty imposed by sec. 180 of the Dominion Election Act, whether he acted in good faith or not.

[Cobourg, Sept 4.]

This action was tried before His Honour Judge Clark, without a jury, at the last June sittings. The facts on which the plaintiff relied were set out in his statement of claim as follows:—

1. On the 27th February, 1883, an election was holden for a member of the Legislative Assembly of Ontario, to represent in said Assembly the West Riding of Northumberland.

2. At such election the defendant was a deputy returning officer, duly appointed, for polling sub-division number one, in the town-

[Co. Ct.]

GARRETT V. ROBERTS.

[Co. Ct.]

ship of Alnwick, in said west riding of Northumberland.

3. One Robert Skinner had at that time his name upon the list of voters for said subdivision, as tenant of the east half of lot 22, in concession 5, in said township, and was at that time actually tenant of said land.

4. The said Richard Skinner, on said day, presented himself to vote at the polling place where the defendant was deputy returning officer as aforesaid, and the vote of the said Richard Skinner was then objected to by the agent of one of the candidates.

5. The said Richard Skinner was willing and offered to take the oath, form 18 of the Election Act of Ontario, and amending Acts, to "swear that he was still actually, truly, and in good faith, possessed to his own use and benefit, as either owner, tenant or occupant, and in such other words as the said Acts prescribe."

6. The defendant, as such deputy returning officer, refused to allow the said Skinner to take the said oath, form 18, without the addition of the words 'and that you are still a resident of the electoral district,' or without the substitution of the said words for the words 'and still are' in said form 18.

7. The defendant refused to allow the said Skinner to vote unless the said Skinner took the oath, form 18, with the addition or substitution before mentioned, and the said Skinner not being able or willing to take such additional or substitutional oath was refused a ballot by defendant, and did not vote. After which statement of facts the plaintiff claimed \$200.

At the trial the learned judge found the facts to be as alleged in paragraphs 1, 2, 3, 4 and 7 of the statement of claim. That Skinner did not offer to take the oath as alleged in paragraph 5, and that the defendant did not refuse to allow Skinner to take the oath mentioned in paragraph 6 as therein alleged.

Immediately after this finding the plaintiff, in open court, moved for judgment. The hearing of the motion was enlarged till the 20th July, when it was argued by

H. R. Riddell, for plaintiff, and

Hector Cameron, Q.C., for defendant.

CLARK, CO. J.—Since the trial there has been no application for a new trial or other substantive motion to disturb my finding of facts. If it were necessary to decide now whether that

finding was correct, my judgment would be that the evidence fully supports it.

Section 180 of the Election Act, R. S. O. cap. 10, is as follows:—"Any deputy returning officer or poll clerk who refuses or neglects to perform any of the obligations or formalities required of him by this Act, shall for each such refusal or neglect incur a penalty of two hundred dollars;" and by section 182, "All penalties imposed by this Act shall be recoverable with full costs of suit by any person who will sue for the same by action of debt or information in any of Her Majesty's courts in this province having competent jurisdiction..."

Though it was made apparent by the addresses and argument of counsel at the trial that the action is brought under section 180, it was not so mentioned in the statement of claim, and the first objection against a judgment in favour of the plaintiff was based on that omission—it was contended that suing in the character of an informer and for a penalty, it was not enough for him to describe the bare facts on which he relied—that (under sec. 182, ss. 2) he must at least allege that the facts stated amounted to an offence, and that the defendant acted contrary to that statute, and it was urged that a court should not aid the plaintiff by permitting an amendment in a case of this kind.

The Bank of Montreal v. Reynolds, 24 U. C. Q. B. 381, is an authority against this contention. There the defence was usury, and it was held that the amounts named as the loans by the plaintiff were material and ought to have been correctly stated, which they were not, but at the trial Wilson, J., refused to allow them to be amended, "he doubted if the power should be exercised when the consequences were so serious."

The question whether the amendment ought to have been permitted went to the full court, of which the judgment was delivered by Draper, C.J. He said:—"The legislature have relieved the court and judge from considering the character of the action or of the defence. They give a simple rule for the purpose of determining in the existing suit the real question in controversy," and the decision of the court was that the amendment ought to have been allowed as a matter of course. In his judgment he set out C. L. P. Act, sec. 222, the en-

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actment under which permission to amend had been asked ; he pointed out that that section used the word "may" concerning one class of amendments, and "shall" as to another, and he spoke of the language which applies to amendments necessary to determine the real question in controversy as amounting to "a mandate," and he was "free from doubt" on the matter before the court.

I feel that if the defect pointed out by the defendant in this case is a material one, then I should be preventing the trial of the real question were I to refuse permission to amend.

The language on which that case turned is reproduced in Rule 178 of the Judicature Act : "All such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." Assuming then that the statement of claim was defective, as argued by the defendant, I think it would have been my duty at the trial, if asked, to allow its amendment.

The only other question is whether the defendant, having been silent on that occasion, is thereby strengthened in his present position. I think the proposition answers itself. If there is any difference in the rights of the parties then and now, his must be diminished who refrained from objecting to a fault at a time when it could be remedied, and if it were not possible to remedy it now, principle might require me to say that the objection was too late and would not be heard, but that difficulty is not in my way. Rule 474 of the Judicature Act declares that "the court or a judge may at any time and on such terms as to costs or otherwise, as to the court or judge may seem just, amend any defect or error in any proceedings ; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case." As the plaintiff has asked to amend his statement of claim if it be defective, I shall order under this rule that it be amended so as to conform to the requirements of the said section 182.

Passing now from matters of form, I understand the defendant's main contention to be that there is no evidence that the defendant did not

conscientiously believe it to be his duty to take the course he did, and that if he did so believe then he could not be liable to a penalty, especially as the statute visits the non-payment of it with imprisonment, in other words he argued that the statute should be construed as intending to punish only wilful offenders. If this is the true reading the plaintiff ought not to recover.

The statement of claim did not allege on the part of the defendant any wilful intention to neglect the formality or obligation imposed on him ; if such an allegation was considered to be a necessary element in the case, its absence might have been made the ground for a demurrer, which would have been probably the most convenient as well as the most regular way to try the question ; but the omission does not relieve me from deciding now whether such an intention is a *sine qua non*, for the plaintiff cannot have judgment if the facts alleged and proved are not sufficient in point of law to entitle him to recover. I may say that if there had been an issue involving the question I should have found at the trial that the defendant committed the wrong complained of under a conscientious belief that he was doing no wrong ; but as I read the statute that would not help him.

This is an action of debt, and I do not think the addition of imprisonment to the usual method of enforcing the judgment authorizes me to treat the defendant as if he were being tried as a criminal, and nothing short of that would accord with his contention and enable me to say he is to go free because *mens rea* was not established.

The plaintiff cites *Pickering v. James*, L. R. 8 C. P. 489, in support of his right to recover. It is true that the plaintiff there was held entitled to judgment against an official acting under the Ballot Act who had unintentionally neglected his duty. That, however, does not go far enough to show any liability on the part of this defendant. In that case the discussion was mainly on the question whether the Act had cast certain duties on the defendant, which being found in the affirmative, the plaintiff, who had been aggrieved and had in fact lost his election through the error of the defendant, was held entitled to recover damages though the error had been without malice or want of reasonable care. That, however, was only following a principle well

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settled, that when a ministerial duty is imposed an action will lie for the breach of it. That and similar cases, which give damages to parties who are injured by the wrong done, throw no light on the reason for directing the defendant in this case to pay \$200 to the plaintiff, who has not been injured. The reason is to be found in the positive language of the Election Act already quoted.

It is not for me to decide whether the legislature ought to enact that an officer of the law acting in a ministerial capacity, and conscientiously believing he was doing right, shall be made to pay a penalty or be imprisoned because he did not know he was doing wrong, and irrespective of the question whether the plaintiff or any one else suffered by his mistake. I have only to say whether such a law has been made, and I think it has.

I construe section 180 as meaning what it says, and to interpret it as relating only to wilful refusal or neglect, would, in my judgment, be undertaking to make the law instead of expounding what is already made. In taking this view I do not overlook the rule which requires the words of each portion to be given that meaning which will best accord with the general intent of the whole Act. But as far as I am able to judge there is nothing in the language of this section contrary to the tenor and object of the whole law of which it forms a part.

There is a *dictum* in a practice case, which fortifies me in my opinion. *Cameron v. Lucas*, 9 Prac. R. 405, was an action for the penalty mentioned in section 108 of the Dominion Election Act of 1874, the language of which is almost identical with that of section 180 in question here. The statement of defence alleged "that if he, the defendant, neglected to perform such of the obligations or formalities required of him by the Dominion Election Act of 1874, as are set forth in the plaintiff's statement of claim, such non-performance was unknown by and unintentional on the part of the defendant, and was not the result of a guilty mind with respect to such non-performance." An application was made to strike out this paragraph on several grounds, amongst others, because it was no answer. The pleadings were ordered to be amended without deciding on its sufficiency; but, in disposing of the matter *Cameron, J.*, made this remark:—"I may say I have very little

doubt the paragraph shows no valid grounds of defence."

I have still to say whether the facts proved amount to a refusal or neglect to perform any of the obligations or formalities required of a deputy returning officer by the Ontario Election Act. Section 91 is as follows:—"The deputy returning officer shall receive the vote of any person whose name he finds in the proper list of voters furnished to him, provided that such person, if required by any candidate or by the deputy returning officer himself, takes the oath or affirmation hereinafter mentioned, which such deputy returning officer is hereby empowered to administer. Such oath shall be according to form 18 in Schedule A to this Act, where the person claims to be entitled to vote in respect of real estate . . . No other oath or affirmation shall be required of any person whose name is entered on any list of voters as aforesaid."

The facts established by the verdict show that the defendant was a deputy returning officer, that he found the name of Skinner in the proper list of voters, that Skinner attended the polling place and claimed to vote in respect to real estate, that he was a tenant of land in the polling sub-division of the defendant, that the defendant refused to allow Skinner to vote unless he would swear amongst other things that he was a resident of the electoral district.

Now the form alluded to in sub-section 2 does not require a tenant to swear that he is still a resident of the electoral district, but the defendant took upon himself to decide, and did decide, that this tenant should not vote unless he would so swear, and he acted on that decision. The explanation given of this conduct is that when Skinner went up to vote some one present asserted that Skinner's tenancy had ended, and without further enquiry the defendant assumed it to be true.

The main fact of the case was proved beyond question; the defendant, in his evidence, did not prevaricate or attempt to deny it. He said, "I refused to allow him to vote unless he took the oath with the words 'and still are' left out, and the other clause substituted to the effect that he was still a resident of this electoral district, after that he went out without voting."

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In my opinion the defendant refused to perform an obligation required of him by the Election Act.

Judgment is for the plaintiff with full costs, the statement of claim to be amended as aforesaid.

RAILWAY CASES.

IN RE O'BOYLE AND THE ONTARIO AND QUEBEC RAILWAY.

Dominion Railway Act of 1879, 42 Vic. ch. 9.

The notification of the non-acceptance of the sum offered by the railway company, and the appointment of an arbitrator on behalf of the owner of the land, under sub-sections 15 and 16 of sec. 9 of the Dominion Railway Act of 1879, need not be in writing when the facts sufficiently show that the owner was aware of the Company's offer, and verbally refused to accept it, and named his arbitrator.

[Whitby, Sept. 25.]

This was an application to the County Judge to appoint a sworn surveyor, to act as sole arbitrator under sub-sec. 15 of sec. 9 of the Dominion Railway Act of 1879. The application was opposed on the part of the claimant. Affidavits on both sides were put in, from which it appeared the owner was duly served with the notice required by sub-sec. 12 of sec. 9, but, being illiterate did not read it, and lost it some time before the expiration of the ten days from its service. They further show that he was aware of its material contents and the offer made, and that he had an interview with the company's secretary and solicitors before the expiration of the ten days after service, at which he, *ore tenus*, refused acceptance of the offer and named his arbitrator.

DARTNELL, J.J.—I strongly urged upon the owner to accept the arbitrament of a sworn surveyor, as just as likely to do full justice between him and the company as any other tribunal, and being much less expensive to him should the award be against him—but without avail. He has a right to the tribunal given by the Act, unless his own conduct has deprived him of it.

When the words of a statute have the effect of depriving any one of a right they must be construed strictly, and as the words of the statute in question do not require the notification of the non-acceptance of the offer and of the name of the owner's arbitrator to be in writing, and the evidence showing such notification to have

actually taken place, although not reduced to writing, I think I should decline to make the appointment of a sole arbitrator.

Application refused.

SECOND DIVISION COURT OF THE COUNTY OF YORK.

HUNTER V. SAUNDERS.

Joint tortfeasors—No contribution.

In a *qui tam* action judgment was recovered against four justices. One paid the amount of the judgment and sued one of his co-defendants in the Division Court to recover a contribution of one-fourth of the judgment and costs.

Held, that they were joint *tortfeasors*, and that no contribution could be enforced.

[Toronto, Nov. 16.]

The facts of the case sufficiently appear in the judgment of

MCDUGALL, J.J.—In this action the plaintiff seeks to recover from the defendant the sum of \$26 as a contribution, being one-fourth share of a judgment obtained against the plaintiff, the defendant and two others, and which the plaintiff in this action, under the pressure of execution issued against his goods, was compelled to pay.

The plaintiff and defendant are Justices of the Peace for the County of York. The plaintiff, defendant and two other justices of the county tried one Lloyd for an offence committed by him, and convicted him. The plaintiff was requested by his associates to see to a proper return being made of the conviction in due time to the Clerk of the Peace, and he undertook the duty. The conviction not being returned in proper time, Lloyd brought a *qui tam* action against all four justices, and recovered a judgment against them in default of a plea for the penalty \$80, and \$24.71 costs. The amount of the said judgment was paid under pressure by the plaintiff.

The general principle of law no doubt is very clear that there is no contribution between joint *tortfeasors*. It is contended that there are exceptions to the general rule, and that this action can be sustained under some of the cases.

In *Merryweather v. Nixan*, 8 T. R. 186, Lord Kenyon laid down broadly the principle that no contribution could be claimed at law as between wrong doers. He made this qualification—that contribution might sometimes be enforced in

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cases of indemnity, where one man employs another to do acts not unlawful in themselves.

In *Adamson v. Jarvis*, 4 Bing. 66, Best, C.J., said that the rule that wrong doers cannot have redress or contribution against each other is to be confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

In *Betts v. Gibbons*, 2 Adol. & E. 76, Lord Denman, in commenting on the cases, particularly the two above quoted, says that the cases would appear to go this far "that where one party induces another to do an act which is not legally supportable, and yet is not clearly a breach of law, the party so inducing shall be answerable to the other for the consequences." Taunton, J., in the same case, says:—"The principle laid down in *Merryweather v. Nixan* is too plain to be mistaken. The law will not imply an indemnity between wrong doers. But the case is altered when the matter is indifferent in itself, and when it turns upon circumstances whether the act is wrong or not." The case of *Wooley v. Batte*, 2 C. & P. 417, was an action by one proprietor against a co-proprietor for contribution, the plaintiff having had to pay damages caused by the negligence of a servant of the proprietors, but that was evidently a case of partnership. The same may be said of *Pearson v. Skelton*, 1 M. & W. 504. A ground alleged in these cases too, was that the wrong doers in these cases were *tortfeasors* only by inference of law. In the latter case a non-suit was sustained because the question of liability involved the taking of partnership accounts, and was therefore a case for equity.

It has been expressly held that where the tort amounts to a crime there is no contribution: *Shackel v. Rosier*, 2 Bing. N. C. 648; *Colburn v. Patmore*, 1 C. M. & R. 73.

In *Power v. Hoey*, 19 W. R. 916, the question of the liability of wrong doers is fully discussed, and the learned Irish Vice-Chancellor states that the principle that there is no right of indemnity between wrong doers is confined to cases where the fraudulent or illegal transaction is itself the basis of the claim, but that the rule does not apply where the transaction, though leading to that which is the basis of the claim, is separable from it.

The only case which has been cited or which I have been able to find where perhaps the doctrine laid down seems to favor the plaintiffs contention is an American case—*Armstrong Co. v. Clarion Co.*, 66 Penn. St. 218. There two counties were jointly responsible for maintaining in repair a bridge over a stream running between the counties. It was allowed to get into a state of disrepair, and a traveller was injured. He sued and recovered damages against Armstrong County. This county brought an action against Clarion County to enforce contribution to the extent of one-half the damages which it had been compelled to pay. The court, after reviewing the English cases, held that in the case before them the plaintiffs could recover.

In the present case the omission of duty subjected the justices to a penalty of \$80. True it may be that it was as much the duty of one as the other to make the proper return of the conviction, indeed it required the signatures of all the justices; but all failed to make a return, and therefore all became liable to the penalty. It appears to me that all being in fault, and having incurred the consequence of a joint default—the responsibility for a statutory penalty—they were joint *tortfeasors*. Nor can the case be brought within the doctrine of the cases of doing an act not unlawful in itself, for here the omission to perform the duty was expressly contrary to the statute, and therefore unlawful, and unlawful to the knowledge of each of the justices. The American case above cited is, in my opinion, not in point. There there was no statutory penalty. There was a liability to the injured party for pecuniary damages. Again I do not think the case entirely reconcilable with the English authorities, and even if the doctrine laid down could be supported I think the present case distinguishable. Here the plaintiff knowingly omitted to perform a duty imposed by statute. Morally as between himself and his associate justices it was his personal neglect that caused all the difficulty. The defendant and the others were not at all absolved from their responsibility by reason of this fact, but certainly his own neglect raises no equity in favor of the plaintiff.

The penalty imposed by the Summary Conviction Act is in the nature of a statutory fine, and although the failure to return the conviction does not amount in law strictly to a crime, it is an offence which is somewhat akin in its con-

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sequences. The informer sues on behalf of himself, and the Crown for the recovery of the penalty, and one-half thereof, when recovered, belongs to the Crown, and is applied to the public uses of the Province. The difference between a fine imposed for an offence punishable by summary conviction, or by indictment, where the whole fine is appropriated by the Crown, and the case of the recovery of a penalty for not making a return of a conviction where one-half goes to the Crown, consists chiefly in the mode in which the penalty or fine is proceeded for. The penalty is recovered by civil action, and the fine proceeded for by information, and summons followed in both cases by a judgment of the court.

Upon the law as above summarised, and upon the facts stated, I am therefore clearly of the opinion that the plaintiff is not entitled to succeed, and I must direct the entry of a nonsuit.

EIGHTH DIVISION COURT OF THE COUNTY OF YORK.

HANNON V. CHERRY.

*Lien of innkeeper—Sale of chattels left by
guest—Waiver of lien.*

A man left a stolen horse with C., an innkeeper, as security for a night's lodging for himself and horse. He never came back to redeem the animal. C., after advertising and getting no claimant for horse, at expiration of four months sold horse to pay for its keep. Five years afterwards, through conviction of thief, the true owner learned that the horse was left with C. He demanded the animal; but C. having sold it was unable to comply with demand.

Held, that before 45 Vict. cap. 16, an innkeeper had no power to sell goods of guest to realize his lien without consent of owner of goods.

Held also, that the unauthorized sale in this case was a waiver of the lien, and rendered innkeeper liable for damages for the conversion to extent of full value of the horse, and that claim for keep could not be deducted from damages.

[Toronto, Nov. 16.

The facts of the case fully appear in the judgment of

MCDUGALL, J.J.—The plaintiff in this case is a livery stable keeper in Hamilton. The defendant an hotel keeper in the County of York. In 1877 the plaintiff had a mare stolen from him at Hamilton. He subsequently, in 1881 or 1882, secured the arrest of the thief, and procured his conviction. From the thief he learned

that he (the thief) had left the stolen horse with an hotel keeper in the township of York. From the evidence it appears that the defendant was the hotel keeper in question. The thief came to the defendant's hotel in 1877, the next day after the alleged theft, and stopping over night at his hotel left in the morning without paying his bill, but leaving the horse as security therefor, promising to return in a few days to settle the claim and redeem his horse. He never came back again. After waiting a couple of weeks the defendant advertized for an owner of the horse in the *Globe* newspaper. Getting no reply to the advertizement the defendant, at the end of about four months, advertized a public sale of the horse, and at the sale bought it in himself, after some competition, for \$42. He kept the animal about a month or six weeks longer and sold it for \$50. There is no doubt from the evidence, and the defendant himself does not seriously dispute the fact, that the horse in question was the horse stolen from the plaintiff in 1877; and that it was left with him by the thief.

The plaintiff in this action claims the right to recover the value of the horse from the defendant on the ground that the sale by the defendant was an act of conversion which waived the lien, and renders him liable for the value of the animal. The defendant claims a set off for the keep of the horse for four months.

There is no doubt that at common law an innkeeper was not bound to enquire whether the guest who might come to his inn was the true owner or not of the goods he brought with him. The sole question of importance as affecting the rights of the true owner would be whether the person leaving the goods with the inn-keeper was in fact a guest; for if he came as a guest the inn-keeper was bound to receive him and his goods whatever their nature: *Johnson v. Hill*, 3 Stark 172; *Threfall v. Barwick*, L. R. 10 Q. B. 210; *Kent v. Shuckard*, 2 B. & A. 805. He was bound to receive him if he had accommodation, and having received him as a guest, would have a lien upon any goods brought by him, which lien could not be defeated even by the true owner: *Johnson v. Hill*, *supra*. The owner would have his remedy against the guest. But although the landlord is not bound to enquire who is the owner of the goods, still if it can be shown that he knew the

guest was *not owner*, he will have no lien upon them: *Broadwood v. Granara*, 10 Ex. 423. Having once obtained a right of lien it remains as long as the goods remain, and the person who bought them retains the character of a guest. Continuance of possession of the goods is absolutely necessary to enable the holder of the goods to exercise his right of lien: *Ryall v. Roth*, 1 Atk. 165. The general principle appears to be that if an inn-keeper allows a traveller to leave goods at his inn, and the traveller never becomes a guest, the innkeeper is answerable for the loss or damage to the goods, and consequently will have no lien upon them, for in the case of goods the right of retainer exists only in consideration of the obligations due to the guest; but it would be otherwise as to animals or chattels, which may be improved by keeping, for then the general principle of the law of lien prevails, and the innkeeper can retain a horse for its keep even though the person who has brought it to the inn has not lodged it there himself: *Allan v. Smith*, 12 C. B. N. S. 638. The mere leaving the horse constitutes the person who leaves it "a guest," and thus the landlord becoming responsible has also his security. In the present case there is no doubt, however, that the thief became a guest, for he lodged all night with the defendant, and the horse was kept in the stable.

But another principle of the peculiar nature of an inn-keeper's lien is that the property detained cannot be sold unless by the consent, express or implied, of the owner, either to reimburse the inn-keeper for the original bill, or to cover the expenses incurred in keeping it: *Thames Iron W. Co. v. Patent Derrick Co.*, 1 Johns & W. 97. A lien is a *mere right of detention* for the debt due, and the property cannot be parted with or sold without a waiver of lien: *Jones v. Pearl*, Strange 556; *Ex parte Shunk*, 1 Atk. 234; *Kruger v. Wilcox*, Amb. 252; *Wilkins v. Carmichael*, Dougl. 101; *Sweet v. Ryan*, 1 East. 4; *McCoulbie v. Davies*, 7 East 5.

In the present case, in view of the authorities, I must hold that the sale of the horse in question determined the lien, and rendered the defendant liable to the plaintiff, the true owner, for the value of the animal. And the lien being ended there can be no claim for the keep of the horse against the plaintiff.

It is unfortunate for this defendant that the

Ontario Act, passed in 1882, had not been on the Statute book some years sooner. That Act, 45 Vict. cap. 16, Ont. enables an inn-keeper, (providing certain formalities are observed), to sell a horse or other animal should his claim in respect of them be unpaid for the space of *two weeks*—a salutary provision, and conferring a power which it is somewhat surprising to find the legislature have been so tardy in extending to our numerous publicans.

As to the damages, under all the circumstances of the case, I think they should be the price realized by the defendant at his last sale of the animal, when he sold it as his own property, viz. \$50. The defendant appears to have acted in good faith though in ignorance of the law. Verdict for plaintiff, \$50.

RECENT ENGLISH PRACTICE CASES.

MCGOWAN ET AL V. MIDDLETON.

Imp. O. 19, r. 3; O. 23, r. 1—Ont. rr. 127, 170.

Pleading—Discontinuance of action—Counter-claim.

By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.

Vannasse v. Kraft, L. R. 15 Ch. D. 474, overruled.

[C. A., L. R. 11 Q. B. D. 464.]

Per BRETT, M. R.—I think that a counter-claim is not a cross-action; it cannot be deemed an action, it not being commenced by writ of summons. But a counter-claim must be treated as if it were a proceeding in a cross action. . . . The fundamental idea of the framers of these statutes [the Judicature Acts] is to be found in the Judicature Act, 1873, sec. 24, sub-s. 7 (Ont. Jud. Act. sec. 16, sub-s. 8.) . . . The plaintiff's action being discontinued, that which is only a defence to it drops with it; but anything beyond a defence, anything in the nature of a claim against the plaintiff, must be treated separately and cannot be discontinued. . . . The plaintiff has a right to plead to it (the counter-claim) anything which would be a defence to a cross-action; the old doctrine of defence in pleading is gone, and the plaintiff may plead by way of defence to the counter-claim the facts averred in the claim which he has discontinued; but he must do that within a limited time, and if he

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does not deliver a pleading within a proper time, the defendant has a right to ask for judgment.

FRASER V. COOPER, HALL & CO.

WADDELL V. FRASER.

Imp. O. 22, r. 6—Ont. r. 165.

Counter-claim against non-party—Appearance thereto.

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance gratis, *i.e.* until such service upon him as is mentioned in the above rule.

[L. R. 21 Ch. D. 685.]

Per BACON, V. C.—Counter-claims, though they are to be treated for some purposes as independent actions, are the creatures only of the statute. They did not exist in any form or kind until this Act was passed. The Judicature Act has introduced an entirely new practice, and in ascertaining that practice, the rules must be construed according to the words used.

WEBB V. STENTON.

Imp. O. 45, r. 2—Ont. r. 370.

Attachment of debts—Income from trust fund—“Debt owing or accruing.”

A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order, attaching the debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, and that there was no money, the proceeds of the trust property, in the hands of the trustees.

Held, that although any debt, legal or equitable, may be attached under the above rule, there was here no debt, “owing or accruing” at the time when the order was applied for which could be attached under it.

Seemle, that the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Chancery Division.

In re Cowan's Estate, L. R. 14 Ch. D. 638, considered.

[C. A., L. R. 11 Q. B. D. 578.]

Per BRETT, M. R.—It seems to me, upon the plain reading of O. 45. r. 2 (Ont. r. 370), that no order can be made unless some person at the time the order is made is indebted to the judgment debtor. If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment debtor shall be attached. If there is a debt due payable *in presenti*, of course an order may be

made to attach that debt. If there is not a debt payable *in presenti*, but there is a debt in existence, *debitum in presenti*, but payable *in futuro*, it seems to me that such an order could be made with regard to that debt, although it be the only debt, and there is no debt payable *in presenti*, because such third person is indebted to the judgment debtor, and that would satisfy the words of the rule. . . . It seems to me that the meaning of “accruing debts,” in O. 45, r. 2 (Ont. r. 370) is *debitum in presenti, solvendum in futuro*, that it goes no further, and that it does not comprise anything which may be a debt, however probable and however soon it may be a debt. That is the construction which I put upon this rule.

Per LINDLEY, L. J.—I am of the same opinion. The question is one of very considerable importance, especially as our decision is likely, we are told, to disturb the practice, in Chambers at least, of the Chancery Division, if not of the Common Law Division.

Per FRY, L. J.—I agree in the conclusion which has been arrived at by the other members of the Court. . . . I will make one more observation only. It appears to me that in arriving at this conclusion we are not laying down any rule which will produce a defect in the administration of justice. I think the power of the judgment creditor to obtain a receiver under the practice of the Chancery Division is adequate to meet all that may be required, and will prevent any denial of justice.

THE MERSEY STEAMSHIP CO. v. SHUTTLEWORTH & CO.

Imp. O. 19, r. 3; O. 40, r. 11—Ont. rr. 127, 322.

Claim, admission of—Counter-claim—Payment into court.

In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater extent.

The Court refused an application under Imp. O. 40, r. 11 (Ont. r. 322) for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into Court to abide the result of the action.

Per COTTON, L. J.—The orders and the rules under the Judicature Acts ought to be construed with reference to one another, and we must not

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over-look the rules as to counter-claims. . . The contention for the present plaintiff is that whenever the claim of a plaintiff is admitted, he is entitled to have the money paid into court. I cannot agree to that argument; a plaintiff is not entitled to have the money paid into court unless the counter-claim is frivolous and unsubstantial.

UNITED STATES.

CIRCUIT COURT—DISTRICT OF KANSAS.

COBB V. PRELL.

Contract for future or non-delivery.

When it is the intention of the parties to contracts for the sale of commodities that there shall be no delivery thereof, but that the transactions shall be adjusted and settled by the payment of differences, such contracts are void.

It is the duty of the courts to scrutinize very closely contracts for future delivery, and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to the delivery and receipt of the commodity.

As the evidence in this case establishes the fact that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market and to settle the profit or loss of defendant upon the basis of the prices of grain on the 3rd of May, 1881, as compared with the prices at which defendant contracted to sell, the contracts sued upon are void, the plaintiff cannot recover.

[Am. Law Rep.—Sep.]

Action at law for breach of contract.

The opinion of the court was delivered by

MCCLEARY, J.—In this case a jury was waived and the cause was tried by the court. It is an action at law in which the plaintiff claims damages for breach of contract. The complaint alleges that during the months of February, March and April, 1881, the defendant, who is a grain dealer, residing at Columbus, Kansas, authorized the plaintiff, who is a commission merchant at St. Louis, Missouri, to sell for him certain quantities of corn to be delivered to the party or parties to whom the plaintiff might sell the same, at the option of defendant, during the month of May, 1881. The complaint further alleges that the plaintiff contracted for the sale of said corn, to be delivered during said month of May; but that defendant failing to deliver said

corn, the plaintiff having contracted to sell the same in his own name, was obliged to and did pay the damages resulting from such failure, to wit: the difference between the price of corn at the place of delivery on the 31st day of May, and the price at which defendant had agreed to sell and deliver the same, amounting in the aggregate to \$2945.25, for which, with interest, he prays judgment.

The answer alleges that the contracts set out in the complaint were option or marginal contracts, and that said plaintiff well knew them to be such, and so made the contracts of sale of said corn, not expecting to receive of the defendant any portion of the amounts of corn for delivery, but expecting to pay any losses or receive any gains that might accrue for or against said defendant; that said contracts were made for the purpose of speculating on the rise and fall of prices, the plaintiff to receive commissions for such transactions; and that said contracts were mere wagers on the fluctuating of the prices of grain in the market of the city of St. Louis.

The case therefore turns upon the question whether or not it was the intention of the parties that the corn should be delivered. If such was the *bona fide* intention, then the plaintiff is entitled to recover; but if, on the other hand, it was understood that the defendant was not required to deliver the corn, and that the transactions should be adjusted and settled by the payment of differences, then the contracts were void and the plaintiff cannot recover. Upon this controlling element in the case, as might reasonably be expected, the testimony of the plaintiff and defendant is in conflict. Under such circumstances we are obliged to determine the controversy by reference to the actions of the parties in connection with the transactions and their contemporaneous declarations, especially those in writing, having a bearing upon the subject. If we can learn from these what interpretation the parties themselves have put upon their own contract, we shall find a satisfactory guide in determining the case.

The evidence satisfactorily shows that the plaintiff was largely engaged at and about the time of these transactions in dealing in options. He was also largely engaged in buying and selling grain for actual delivery. It appears that he adopted and had in use two blank forms upon which statements of account were rendered

U. S. Rep.]

COBB V. PRELL.

[U. S. Rep.]

to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage and commissions. These are charges which necessarily entered into the transaction where the grain was shipped and delivered. In the latter statements these items do not appear. They show only the number of bushels of grain bought, the price at which bought and the month of delivery; the price at which the same was sold and the net loss or gain. There are in evidence thirty-four of these last-named bills, used in the settlement of option deals between June 26th, 1881, and July 30th, 1881, all representing transactions between plaintiff and defendant. Of the bills representing actual sales from defendant to plaintiff between September 18th, 1880, and April 19th, 1881, there are fifty-seven; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the grain contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins. It only remains to be determined whether the transactions in controversy belong to the former or to the latter class. If the question were to be determined upon the testimony of the parties themselves, conflicting as it is, in connection with the facts already stated, it would probably depend upon the question, upon which party rests the burden of proof? And I am inclined to the opinion that, without reference to other evidence, the plaintiff would fail.

It is the duty of the courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw doubt upon the question of the intention of the parties it is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view to delivery and receipt of the grain: *Barnard v. Backhans*, 9 N. W. Rep. 595.

It appearing that the parties were in the habit of dealing in options, and the evidence being equally balanced upon the question whether these were option contracts or not, the court would be obliged, I think, to say that the plaintiff has failed to make out his case by a pre-

ponderance of evidence. But whether this be so or not, a reference to the written evidence, to be found in the correspondence of the parties at and near the time of the transaction, strongly corroborates the defendant. A number of letters, written about the time of these transactions, and evidently referring to them, are in evidence, and an examination of them will show that the plaintiff was constantly insisting, not upon the shipment of the quantity of corn purchased by him, but upon the payment of margins, either in cash or by the shipment of enough corn to cover margins. February 11th plaintiff writes to defendant, referring to the transactions between the parties as "option deals." April 22nd, he writes, "We had to put up over \$2,000 on your deals," &c. May 2nd, he says, "You must ship us some corn as a margin." May 7th, he says, "If you can't ship us any corn to cover margins, please send us \$500." May 18th, he writes, "We draw \$500 on you. This is margins for your corn deals, which we hope you will pay. This will leave you about \$300 behind to make corn deals up to market." May 27th, he says, "We have written you and drawn on you for margins."

Perhaps the most significant letters bearing upon this question are those of May 30th and 31st, the dates on which the time for the delivery of the corn expired. If it was a *bona fide* transaction, and plaintiff was expecting the delivery of the corn, we should expect to hear him, in these letters, complaining or expressing surprise that the time was about expired and the corn had not been delivered. But, on the contrary, a reference to the letters of those dates will show that the only complaint was that defendant had not furnished the margins. Thus, on May 30th, plaintiff writes, "We cannot carry these deals when you not only refuse to give us margins, but seem to pay no attention to our demands." On the 31st plaintiff writes to explain the manner in which he had closed out the May corn, and expressing regret at the serious loss to the defendant, but says nothing to indicate that he expected the corn to be shipped. Upon all of the evidence, I am of the opinion, and therefore find the fact to be, that the parties did not intend the actual delivery of the corn contracted for, but did intend to speculate upon the future market, and to settle the profit or loss of the defendant upon the basis of the prices of the grain on the

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

31st May, 1881, as compared with the price at which defendant contracted to sell. Such being the fact, the law is well settled that the plaintiff cannot recover: *Melchert v. Am. Un. Tel. Co.* 11 Fed. Rep. 193; *Gregory v. Wendell*, 39 Mich. 337; *Pickering v. Cease*, 76 Ill. 328; *Barnard v. Backhans*, *supra*.

Judgment for defendant.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH DIVISION.

In Banco.]

[Nov. 24.]

HENDRIE V. NEELON.

Sale of timber—Non-delivery—Profits—Damages.

Plaintiff agreed to deliver timber to defendant at S. for carriage to O., to be sold there. There was no market nearer place of delivery than O. Delivery was not made. Defendant counter-claimed for non-delivery.

Held, [CAMERON, J., dissenting,] that the measure of damages was what timber was worth at O., minus what the carriage there from the place of delivery cost.

Osler, Q.C., for motion.

E. Martin, Q.C., contra.

Full Court.]

[Nov. 24.]

MCCLUNG V. MCCracken.

Statute of frauds—Sale of lands—Evidence—Specific performance—Deed executed but not delivered.

When A., whose wife owned a certain freehold property on St. George street, wrote to B., the owner of a certain freehold property on King street, with reference to the said properties as follows:—"If you will assume my mortgage and pay me in cash \$3,750, I will assume your mortgage of \$5,000 on the leasehold." And B. replied:—"Your offer of this date for the exchange of my property on King street for your property on St. George, I will accept on your terms."

Held, [affirming the judgment of FERGUSON, J., 2 Ont. R. 609,] not a sufficient memorandum of the contract to satisfy the Statute of Frauds.

Held also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence.

Held also, that the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not by recital or otherwise set forth the contract relied on, could not assist B. in the action for specific performance.

Rose, Q.C., for motion.

MacLennan, Q.C., contra.

FOOT V. PRICE.

Deficiency from false survey—Compensation—Trusts declared of original lot—Disclaimer by cestui que trust—Improvement under mistake of title.

G. W. F. being the patentee of a certain lot described as of 200 acres, but in which there was a deficiency, conveyed half of the lot to J. B. P., who conveyed it to trustees to hold in trust for E. F., wife of G. W. F., upon certain trusts contained in the deed, and without power to her to anticipate. It was subsequently discovered that there was a deficiency in the lot, and upon the application to the government in the name of the trustees by G. W. F., whom they appointed their agent for that purpose, a grant of land as compensation for the deficiency was made to the trustees of E. F., describing them as such. Subsequently an instrument under seal, expressed to be made between J. B. P. of the first part; E. F., wife of G. W. F., of the second part; and the trustees of the third part, which recited the facts, and also that the trustees had no real interest therein, but were named as grantees merely as being the legal owners of the original half lot, was executed by J. B. P. and E. F. whereby they declared that the parties of the first and second parts were not in any way interested in the lands granted as compensation, and that the trustees held them as trustees for G. W. F., the patentee of the original lot. Subsequently the trustees, under the direction

of G. W. F. conveyed to E., under whom the defendants claimed. E. F. now brought this action to recover the land.

Held, [HAGARTY, C. J., dissenting,] that E. and those claiming under him, must be held to have had notice of the title of the trustees who were described in the patent as trustees of E. F., that E. F. was not estopped by the declaration executed by J. B. P. and herself, which did not divest her of her title, and that therefore she was entitled to recover.

Held also, that there should be a reference to the Master to take an account of taxes paid and permanent improvements made upon the lands, further considerations being reserved.

Per HAGARTY, C. J.—The legal estate being in the defendant by conveyance from the trustees, the plaintiff should show an equity to recover what she claims as part of the trust estate, which she has not done; that the patent to the trustees, though describing them as such, did not in terms declare any trust respecting the land, and it could not be assumed that they formed part of the trust premises.

Per ARMOUR, J.—The case was not within R. S. O. cap. 95, sec. 4, as to improvement under a mistake of title, but was governed by the principles of equity governing the relationship of trustee and *cestui que trust*.

Per CAMERON, J.—The case was within the statute.

CHANCERY DIVISION.

Boyd, C.]

[Nov. 21.]

ALLEN V. LYON.

*Copyright—Verbal assent to infringement—
Injunction—38 Vict. c. 88, D.*

Action for infringement of copyright in a book. The defendant pleaded assent on the plaintiff's part. At the trial a verbal assent was proved, and it was also proved that the plaintiff was aware of the defendant's intention to publish the parts complained of, in pursuance of such assent, and encouraged the defendant in so doing.

Held, that under these circumstances the plaintiff was not entitled to an injunction.

To create a perfect right under 38 Vict. c. 88, D., there should be an assignment in writing

of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish, but without any writing there may be such conduct on the part of the owner as disentitles him to relief in equity by way of injunction.

The plaintiff having proved some damage, though very trifling, ordered that defendant should get his costs, but only on the lower scale.

W. Cassels, Q.C., and Ferguson, for plaintiff.

Osler, Q.C., and Guthrie, Q.C., for defendant.

Proudfoot, J.]

[Nov. 21.]

MCINTYRE V. THOMPSON.

Mortgage—Parol agreement as to true consideration—Evidence.

Appeal from the report of the Master on Lindsay. A mortgage was given by T. to W., who assigned it to M. No money was actually advanced on the mortgage, but before the assignment to M. a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note.

Held, that M. was entitled to hold the mortgage as security for the amount due him from T.

The rule that a mortgage for a specific sum may be shown to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor, as was the case here.

H. Cassels, for the appellant.

Moss, Q.C., for the respondent.

Proudfoot, J.]

[Nov. 21.]

MCGARVEY V. THE CORPORATION OF THE TOWN OF STRATHROY.

*Injunction—Appeal—Stay of proceedings—
R. S. O. c. 38, ss. 26, 27.*

Motion for a writ of sequestration on the ground of non-compliance with an injunction.

Held, that where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. c. 38, s.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

26, pending an appeal to the Court of Appeal, the proceedings to enforce the injunction are, by virtue of s. 27 of the said Act, thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction. *Dundas v. Hamilton and Milton Road Co.* 19 Gr. 455, followed, and preferred to *McLaren v. Caldwell*, 29 Gr. 438.

Folingsbee, for the motion.

Cattanach, contra.

Proudfoot, J.]

[Nov. 22.]

PARADIS V. CAMPBELL.

Will—Construction—"Children."

Hearing on further directions. A testator devised his farm to his wife for life, and at her decease to be disposed of by his executors in the following manner, viz.:—One-third to his sister F., to her heirs and assigns for ever; one-third to his sister H., her heirs and assigns forever, and the remaining third to the lawful children of his sister P., their heirs and assigns forever, to be apportioned and divided by his executors unto them equally, share and share alike. "And in case either or both of my sisters aforesaid, that is F. or H., is or are dead, or may or do die previous to my decease, then and in that case my will and meaning is that each of their portions bequeathed and devised to them respectively, shall be by my executors apportioned and divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children to them their heirs and assigns for ever."

The testator's sister H. predeceased him, leaving children, who survived the testator, and having a daughter, who died before her mother, leaving a son H. H.

Held, that H. H. took no share of the devise to his grandmother H. It was clear the testator was using the word "children" in a colloquial and not in a technical sense as meaning "children;" but the legal construction of the word "children" accords with its popular signification, viz., as designating the immediate offspring.

Walkem, for the plaintiff.

F. Arnoldi, for the adult defendants.

T. S. Plumb, for the infant defendants.

PRACTICE.

Wilson, C. J.]

[Nov. 13.]

RE MEEK V. SCOBELL.

Prohibition—Division Court—Jurisdiction—Application of deduction from claim.

Motion for prohibition to the 18th Division Court of the County of York. The plaintiff brought his action in the Division Court, claiming \$42.06 debt, and \$62 damages, and at the end of his claim wrote "plaintiff abandoned \$11.39."

Held, that it cannot be assumed the plaintiff, by his claim, reduced his demand for damages so as to bring it within the jurisdiction of the Division Court, as there are other claims in respect of which such abandonment may presumably be applied as well as to the demand for damages.

Prohibition granted with costs.

A. C. Galt, for the motion.

E. Meek, contra.

Wilson, C. J.]

[Nov. 16.]

DEMOREST V. MIDLAND RY. CO.

Mandamus—Disobedience to—Attachment—Officer of corporation.

Where a *mandamus* was directed to a railway company, commanding the company to perform certain acts, and was served upon the president of the company,

Held, that an attachment against the president of the company is not an available proceeding for default in performing an action which he could not by himself perform.

Where the act commanded could only have been done, so far as appeared, by a majority of the board of directors of the company,

Held, that in order to bring them into contempt and subject them to attachment, they should have been served with the *mandamus*.

Held, that sequestration is not the proper remedy for disobedience to *mandamus*.

Holman, for the plaintiff.

A. H. Marsh, for the defendants.

Wilson, C. J.]

[Nov. 17]

RE GARLAND V. OMNIUM SECURITIES CO.

Prohibition—Division Court—Cause of action.

Motion for prohibition to a Division Court of the County of Carleton. The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendant's solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. This action is brought in the Division Court in Ottawa for the recovery of the money so paid under protest.

Held, that when the plaintiff made the payment by reason of the action against him, the defendants' former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa.

Writ of prohibition granted with costs.

Mr. Dalton, Q. C.]

[Nov. 23]

PARIS MANUFACTURING CO. V. WALLS.

Interpleader—Sale of goods before application.

The sheriff having seized goods, which were claimed by a third party, of much greater value than the amount of plaintiff's execution, received from the claimant the amount due on the execution in cash, and withdrew from the seizure.

Held, that the sheriff did not thereby disentitle himself to relief by interpleader.

Aylesworth, for the sheriff.

Watson, for the execution creditors.

John R. Kerr, for the claimant.

BOOK REVIEW.

THE LAW AND PRACTICE OF DISCOVERY IN THE SUPREME COURT OF JUSTICE, with an Appendix of Forms, Orders, etc. By Clarence John Peile, of the Inner Temple, Barrister-at-Law. London: Stevens & Haynes.

We have received the above work, and after examination, are inclined to agree with the learned author in his opinion expressed in the preface, that there is nothing in that "other work upon the same subject" which has recently appeared, to render his own unnecessary. We presume by the "other work" is meant the second edition of "Hare on Discovery." "Hare on Discovery" appears to us to deal with what may be termed the Practice relating to Discovery, at a somewhat disproportionate length as compared with his treatment of the Law of Discovery. In Mr. Peile's work on the other hand, the Law of Discovery is dealt with very fully, and appears to be presented in a very lucid and readable shape. We therefore welcome the work as likely to be more useful than "Hare" in this country, where, though the Law of Discovery is the same, the machinery for obtaining Discovery is somewhat different and of a simpler kind.

FLOTSAM AND JETSAM.

A legal gentleman met a brother lawyer on Court street one day last week, and the following conversation took place:—"Well, judge, how is business?" "Dull, dull; I am living on faith and hope." "Very good; but I have got past you, for I am living on charity."—*Central Law Journal*.

The lot of the Russian counsel is not a happy one, if the *Petersburger Herald* is really correct in a report of a case—for the truth of which it specially pledges its credit. It appears that a Russian peasant in a southern village was accused of theft, and keeping himself out of the way, sent an advocate to conduct his case—a proceeding peculiar to Russia. The magistrate heard the pleading, found the absent culprit guilty, and sentenced him to a flogging. On hearing that the criminal was *non est inventus*, he decreed that the advocate should receive the flogging, observing that the man who had the audacity to defend a rascal deserved to smart. The flogging was, we are told, actually inflicted, and the above named journal vouches for the absolute reality of the whole story.—*Pump Court*.

LAW SOCIETY.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1883.

During this term the following gentlemen were entered on the books of the Society as students-at-law, namely:—

Graduates—John Murray Clarke, Robert Urquhart Macpherson, George Somerville Wilgress, George Henry Kilmer, Robert Charles Donald, Arthur Freeman Lobb, John Joseph Walsh, Francis Edmund O'Flynn, John Hampden Burnham, William Smith Ormiston, Lyman Lee, John Samuel Campbell, Alfred David Creasor, Henry Smith Osler, Charles Perley Smith, Herbert Hartley Dewar, Duncan Ontario Cameron, Wellington Bartley Willoughby, Alexander Lillie Smith, William Chambers, Edward Cornelius Stanbury Iluycke, William Hope Dean, Allan McNabb Denovan, Alexander Fraser, William Ernest Thompson, Alfred Buell Cameron.

Matriculants—Alexander James Boyd, John Wm. Mealy Robert Sullivan Moss, Arnold Morphy, Thos. R. Ferguson, Robert James McLaughlin, William Henry Campbell, Malcolm Wright.

Junior Class—Wentworth Green, Frank Langster, Daniel Frederick McMartin, Frank Reid, Jonathan Porter, William Woodburn Osborne, George Frederick Bradfield, Charles Downing Fripp, Robert Franklyn Lyle, William Charles Fitzgerald, William Edward Fitzgerald, John Wesley Blair, Alexander Duncan Dickson, William George Munroe, Edward Henderson Ridley, Alexander Purdom, George Chesley Hart, William Henry Lake, Robert Ruddy.

The following gentlemen were called to the Bar, namely:—Messrs. Hugh Archibald McLean, William John Martin, Harry Thorpe Canniff, Henry Carleton Monk, David Haskett Tennent, Robert Peel Echlin, Charles Henderson, Alexander John Snow, Robert Taylor, Frank Howard King, William Armstrong Stratton, Robert Kinross Cowan, Thomas Parker, Daniel K. Cunningham, David Mills.

On and after Monday, October 1st, lectures will be delivered in the Law School as follows:—Senior class, Mondays and Tuesdays. Junior class, Thursdays and Fridays of each week, at 8.45 a.m.

Special Notice.—No candidate for call or certificate of fitness who shall have omitted to leave his petitions and all his papers with the secretary complete on or before the third Saturday preceding the term, as by rules required, shall be called or admitted, except after report upon a petition by him presented, praying special relief on special grounds.

RULES

As to Books and Subjects for Examination.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his Diploma, or a proper certificate of his having received his Degree. All other candidates for admission as Articled Clerks or Students-at-law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Articled Clerks.

From	{ Arithmetic. Euclid, lib. I., II., and III. English Grammar and Composition. English History Queen Anne to George III. Modern Geography, N. America and Europe. Elements of Book-keeping.
1883	
to 1885.	

In 1883, 1884, and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil at their option, which are appointed for Students-at-law in the same year.

Students-at-Law.

CLASSICS.

1883.	{ Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Caesar, Bellum Britannicum. Cicero, Pro Archia. Virgil, Æneid, B. V., vv. 1-361. Ovid, Heroides, Epistles, V. XIII.	
1884.	{ Cicero, Cato Major. Virgil, Æneid, B. V., vv. 1-361. Ovid, Fasti, B. I., vv. 1-300. Xenophon, Anabasis, B. II. Homer, Iliad, B. IV.	
1885.	{ Xenophon, Anabasis, B. V. Homer, Iliad, B. IV. Cicero, Cato Major. Virgil, Æneid, B. I., vv. 1-304. Ovid, Fasti, B. I., vv. 1-300.	

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. & III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1883—Marmion, with special reference to Canto V. and VI.

1884—Elegy in a Country Churchyard.
The Traveller.

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DIARY FOR DECEMBER.

15. Sat ... Christmas vac. in Supreme Ct. and Exch. Ct. begins.
[Morrison, J. sworn in Ct. of Appeal, 1877.]
16. Sun ... *Third Sunday in Advent.*
17. Mon ... *First Lower Canada Parliament met, 1792.*
18. Tues ...
19. Wed ...
20. Thur ...
21. Fri ...
22. Sat ... *Shortest day.*
23. Sun ... *Fourth Sunday in Advent.*
24. Mon ... Christmas vac. in Ct. of Appeal and Chy. Div.
25. Tues ... Christmas Day. [begins. Mun. Nominations.]
26. Wed ... U. C. made a Province, 1791.
27. Thur ... Spragge, V. C. appointed Chancellor, 1879.
28. Fri ...
29. Sat ...
30. Sun ... *First Sunday after Christmas.*
31. Mon ... Rev. Stat of Ont. came into force, 1877.

TORONTO, DEC. 15, 1883.

BUSINESS NOTICE.

Until further announcement all communications to this Journal, whether on business or otherwise, are to be addressed to "CANADA LAW JOURNAL, 68 Church St., Toronto." All remittances are to be made to the Proprietors of the Canada Law Journal at the same address.

His HONOR JUDGE BENSON was recently the recipient of a very pleasant congratulatory address from the Bar of Port Hope, his native town, expressing their gratification at his elevation to the Bench. We gladly "concur." The appointment is an excellent one.

We have received through Messrs. Row-sell and Hutcheson a copy of Sir James F. Stephen's *Digest of the Law of Criminal Procedure*, published by Macmillan and Co. This book, the excellence of which goes without saying, completes the set of works on the Criminal Law of the learned author, which are now famous all the world over. The student of Criminal Law is now furnished

with all his heart can desire in the History of the Criminal Law of England, the Digest of the Criminal Law, and the Digest of the Law of Criminal Procedure. The arrangement of the present work is similar to that of the Digest of Criminal Law, the matter being set forth in separate articles, to which are appended illustrations, when required. The contents are sufficiently indicated by the title; and it will no doubt be at once recognized as the standard authority on criminal practice and pleading.

A country paper has been sent to us, with a marked passage, wherein the writer comments on the decision of Mr. Justice Cameron in the South Renfrew case. It is, apparently, impossible to restrain the venomous effusions of disappointed litigants and their friends, especially when politics are concerned, nor is this the first time that the most honorable men on our Bench have been wantonly assailed by those who ought to, but apparently do not, know better. The unsullied reputation of the learned Judge referred to requires no protection at our hands. It needs not to be said that his name is synonymous with true worth, honor and rectitude; that fact is known to all except, possibly, the writer of the article referred to, who, we trust, is by this time heartily ashamed of himself.

Some of the cases set down for hearing before the Chancery Divisional Court were recently dismissed on the ground that copies of the evidence for the use of the Judges had not been furnished prior to the cases coming on for argument, notwithstanding that the

NEW RULES OF COURT.

counsel for the appellants had a certified copy of the shorthand writer's notes of the evidence in Court, and were ready to proceed. The regulation requiring copies of evidence to be furnished for the use of the Judges in this Divisional Court is (as far as we know) a mere private verbal regulation of the Judges of the Chancery Division, and is intended, we presume, to facilitate them in hearing causes; but, so far, it has not been embodied in any rule of Court; and the dismissal of causes merely because this regulation has not been complied with, seems to us rather a high-handed proceeding, and one of doubtful legality. The Judges of the Chancery Division have no power to make rules of Court, and yet the regulation in question is very like an attempt to do so. The regulation is not an unreasonable one, but at the same time, before any penal consequences can be attached to its non-observance, the profession have a right to demand that it be so formally and publicly and authoritatively promulgated, that there can be no reasonable excuse for ignorance of its existence. Country practitioners can hardly, in reason, be expected to be informed of every notice which may temporarily appear on the notice boards of the Courts.

NEW RULES OF COURT:

We have great pleasure in calling attention to the following new rules of Court, dated Dec. 17th. Of Canadian lawyers it may, indeed, be said, to adopt the epigram of Mr. Secretary Evarts—their pride is the wealth of their clients and the poverty of themselves. The latter portion of this principle may, however, be carried too far, and it is refreshing to see that at last the profession in this country has done something for themselves. Probably in no portion of the British Empire is the legal profession worse paid than in

this, or has more work to do for the money. Lawyers know the expense, the delay, and the labour which it takes to fit a man for the legal profession; the general public do not. If lawyers do not look after their own interests no one else will do so. And these two rules which curtail the office hours while they tend to make a slight addition to the remuneration of practitioners, are in our opinion expedient and good. It is needless to point out how the length of office hours necessarily depends on the hours of the day limited for the service of papers, though possibly 4 p.m. is a trifle too early to fix as a limit. In conclusion, we think we are at liberty to mention the name of Mr. C. J. Holman as the gentleman to whose energy this change in the hours of service is mainly due. *Palmar qui meruit ferat!*

The rules are as follows: (1) It was moved, seconded and ordered, that the taxing officers shall have power to allow increased counsel fees in Chambers to an amount not exceeding \$10. This order is to be substituted for item 166 in the order of the 10th September, 1881, respecting the tariff of charges. (2) It was further moved, seconded and ordered, that rule 459 of the Judicature Act be rescinded, and the following substituted:—"Unless otherwise specially ordered in the particular case, service of pleadings, notices, summonses, orders, rules, and other proceedings shall be effected before the hour of four o'clock in the afternoon, except on Saturdays, when it shall be effected before the hour of two o'clock in the afternoon. Service effected after four o'clock in the afternoon on any week-day except Saturday shall be deemed to have been effected on the following day. Service effected after two o'clock on Saturday shall be deemed to have been effected on the following Monday." This order shall take effect on and after the 2nd day of January next.

NOTES OF CANADIAN CASES

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

COMMON PLEAS DIVISION.

Wilson, C. J.]

[Dec. 15.]

DEVANNEY ET AL V. DORR.

*Assessment—Taxes when due—Agreement—
Arbitration—Costs.*

Under the Assessment Act, the assessment is for the purpose of designating the person to be charged, but no debt is due until the rate on the dollar is imposed, and the amount of taxes thus ascertained and fixed.

By an agreement, dated 4th November, 1881, between one Q. and defendants, for the sale of Q.'s business, after reciting that defendants were to pay, satisfy and discharge all liabilities now due and owing, or hereafter to become due and owing, incurred by the said Q. in the said business, &c., the defendants covenanted to pay, satisfy and discharge all the debts, dues and liabilities, whether due or accruing due, contracted by the said Q. in connection with said business, &c. Q. was assessed for goods sold under the agreement, before the making thereof, but the rate was not imposed until May thereafter.

Held, that this was not a debt, &c., contracted in connection with the business, so as to come within the agreement.

By an order of reference the arbitrator was empowered to certify and amend pleadings and proceedings and otherwise, as a judge at Nisi Prius, and the costs of the reference, arbitration, and award were to abide the result of the award.

Held that the arbitrator had no power to make any disposition of the costs, as they were provided for by the reference.

McClive, of St. Catharines, for the plaintiff.
Ayiesworth, for the defendants.

Osler, J.]

[Dec. 15.]

UNION INS. CO. V. O'GARA.

UNION INS. CO. V. SCHOOLBRED.

*Corporations—Calls—Resolutions—By-laws—
Notice—Stockholder—Change of head office.*

Action to recover calls on stock in the defendants' company.

The defendants' act of incorporation provided that the directors could make calls at such times as they might deem requisite, provided that successive calls should be made at intervals of not less than two months between such calls, and that no call should exceed ten per cent., and that thirty days' notice should be given of every such call.

Held, that it is not necessary that calls should be made by by-law, but that a resolution is sufficient for the purpose; and that the resolution need not name the place of payment of the calls, but that this can be done in the notice.

A resolution was passed by which a call was made of 10 per cent., payable on the 1st March, and it was thereby further resolved that a further call of 10 per cent. be made, payable on the 1st September.

Held, clearly not a call of 20 per cent., but two calls of 10 per cent. each; and that the fact of the second call being illegal did not invalidate the first call, because contained in the same resolution.

The act provided that the head office of the company could be changed to such other place as might be determined by the shareholders at any one of the general meetings.

At its general annual meeting, a resolution was passed authorizing the directors to consummate arrangements for the removal of the head office from Ottawa to Toronto. The directors made the change, and the subsequent annual meetings were held at Toronto, at the first of which so held, the by-law referring to the place of holding the annual meetings was amended by substituting Toronto for Ottawa.

Held, that the change was effectually made.

An alleged third call was objected to as being a fourth call, in that the second illegal call before referred to had never been abandoned; but *held*, that the evidence clearly shewed such abandonment.

The same objection was taken as was done in *Union Ins. Co. v. Fitzsimmons*, 32 C. P. 602,

as to there not being 30 days notice, but the objection was overruled on the authority of that case.

In addition to 50 shares personally subscribed by the defendants O. and S., the plaintiffs claimed that they were holders respectively of 75 and 60 shares of the said stock for which they had not subscribed.

Held, on the evidence that O. was not such holder, but that S. was, and was therefore liable thereon.

Foster, and *J. B. Clarke*, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

—
FULL COURT, DEC. 15.

CORPORATION OF WELLAND V. BROWN.

Principal and surety—Collector's roll—Certificate—Entries on roll—Evidence—Commission.

In an action against sureties for a town collector for his default in paying over the taxes collected by him,

Held, (1) that it is not necessary that the roll should be certified, but it is sufficient if it be signed by the town clerk; (2) that entries made by the collector on his roll in the discharge of the duties of his office of taxes paid, are evidence in an action against the sureties.

The jury, without any evidence to justify such finding, allowed the collector a commission of 3½ per cent. on the taxes collected by him.

Held, that this amount could not be allowed, and that the verdict against the sureties must be increased by this amount, less a sum of \$75, which appeared, by a by-law put in, by leave on the argument, to be the proper amount allowable to him, on defendants pleading a plea which would justify plaintiffs in making such deduction.

Lash, Q.C., for the plaintiffs.

Osler, Q.C., for the defendants.

—
REGINA V. FLINT.

Keeping house of ill-fame—Evidence—32 & 33 Vict. ch. 82, D., construction of—Statutory offence, or at Common Law.

On an application to the Divisional Court to quash a conviction made by the Police Magistrate of the city of Toronto against the defendant for keeping a house of ill-fame, there being

evidence upon which the Magistrate could convict, the court refused to interfere.

In the conviction the offence was stated to be against the statute in such case made and provided.

Held, that if not constituted an offence under 32 & 33 Vict., ch. 32, D., the reference to the statute might be treated as surplusage, and the conviction sustained under the common law; but that the reference to the statute might be supported because the 17th sec. imposes a punishment in some respects different from the common law.

Bigelow for the prisoner.

Fenton for the Crown.

—
MCPHERSON V. GEDGE.

Mechanics lien—Lienholder not party to suit—Enforcing lien after dismissal of suit.

Held, Galt, J., dissenting, that a registered claimant under the Mechanics Lien Act, who has not commenced an action in his own right, either singly or alone, with other registered claimants, can in an action brought by other claimants, except in so far as it is his action, which has proceeded to the close of the pleadings, set aside the dismissal of that action which the plaintiffs therein have assented to, and claim the right to prosecute it for his own benefit.

Frank Hodgins, for the applicant.

Langton, for the defendants.

—
FARGEY V. GRAND JUNCTION R. W. CO.

Railway Companies—Amalgamation—Enforcing decree obtained prior to amalgamation.

Part of the consideration for the right of way over plaintiff's land was that the company, the B. & N. H. R. W. Co., should construct a cattle pass under the railway for the use of the plaintiff. The company refused to construct the pass, whereupon the plaintiff, on the 30th April, 1880, filed a bill in chancery against the company to enforce the agreement, to which the company, on the 13th September, 1880, filed an answer, and on the 13th November, a decree was obtained by consent to construct it on certain terms specified therein. In March, 1879, the Act 42 Vict. ch. 53, O., was passed, autho-

C. P. Div.]

NOTES OF CANADIAN CASES.

[C. P. Div.]

returning the B. & N. H. R. W. Co. to enter into a deed of amalgamation with the defendants or any other railway company, subject to the ratification and approval of a majority of the shareholders at a public meeting called for such purpose. On the same day a similar act, 42 Vict. ch. 57, O., was passed authorizing the amalgamation of the defendants with the B. & N. H. R. W. Co. On 29th June, 1880, a deed of amalgamation was entered into between the two companies under defendants' name, which was on the same day ratified and approved of by a meeting of shareholders. By the terms of the deed certain clauses of the Imperial Railway Clauses Act of 1878, 26 & 27 Vict. ch. 92, under the heading "amalgamation" were incorporated therewith. Sec. 42 of said Imperial Act, provides that causes of action arising before amalgamation shall be valid and effectual against the amalgamated company; and sec. 43 provides that suits pending against the dissolved companies shall be continued against the amalgamated company. The plaintiff had no notice or knowledge of the deed of amalgamation or of its contents. On the 4th March, 1881, the Act 44 Vict. ch. 64, O., was passed, by sec. 1 of which the said deed of amalgamation was declared legal and valid, and that the two companies should be amalgamated and united under the said defendants' name in the terms of the said deed. The terms of the decree not having been carried out, the plaintiff brought this action against the defendants to enforce it.

Held, that there was no complete amalgamation of the two companies until the passing of the 44 Vict. ch. 44, O., so that the B. & N. H. R. W. Co. had not ceased to exist when the decree was made, and that it was therefore legal and valid; and that the plaintiff was entitled to enforce it against the defendants.

G. D. Dickson, Q. C., for the plaintiff.

Moss, Q. C., for the defendants.

RE BOTHWELL ELECTION CASE.

Contempt of court—Election law.

On an application on behalf of the respondent H. to an election petition for an order *nisi* calling on the defendant to shew cause why he should not be committed for contempt of court, for publishing in his newspaper, during the currency of an election petition, filed on his behalf, and in which petition the conduct of the

returning officer was complained of, articles, reflecting on the respondent and the returning officer,

Held, that on the materials before the court a *prima facie* case of contempt was made out, but as it appeared on the same materials that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer, and presenting him with a watch as a mark of such public approval, the applicant was also in fault, and the motion was therefore refused.

H. T. Beck for the motion.

RE JARRARD.

Extradition—Altering Public book—Evidence—Alteration—Forgery—Extradition Act of 1877, 45 Vic, ch, 25 D.—construction of.

The prisoner was collector of the county of Middlesex, in the State of New Jersey and kept a book for the entry of the payment and receipt of all moneys received by him as such collector, and which was the principal book of account kept by him. The book was purchased with the money of the county, and was kept in the said collector's office, and was left by him on the close of his term of office. It was open to the inspection of those interested in it, and contained the certificates of the county officials as to the matters therein contained.

Held, that the book was the public property of the county, and not the personal property of the prisoner.

After the said book had been examined by the proper county officers for that purpose, as to the amounts received and paid out by the prisoner as such collector, and a certificate of the same made by them, the prisoner, who was a defaulter with intent to cover up his default, altered the said book by making certain false entries therein.

Held, that this constituted forgery at Common Law as well as under 32 & 33 Vic., ch. 19, D.

Held, also, that under the Extradition Act of 1870, 40 Vic., ch. 25, D., it is essential that the offence charged should be such as, if committed here, would be an offence against the laws of this country. The offence was also proved to be a forgery against the laws of New Jersey.

Osler, Q. C., for the prisoner.

E. Martin, Q. C., and *Fenton*, contra.

Chy. Div.]

NOTES OF CANADIAN CASES.

[Chy. Div.]

COCHRAN V. BOUCHER.

*Absence of Judge when judgment delivered—
Subsequent delivery of judgment.*

In this case judgment given by Wilson, C. J., and Galt, J., Osler, J., not being present, being engaged with assizes, was declared invalid in consequence of Wilson, C. J., having delivered the judgment at the trial. Subsequently Osler, J. delivered judgment concurring that the order should be discharged, and the other Judges affirmed their judgments previously delivered.

Lash, Q. C., for the plaintiff.

Moss, Q. C., for the defendant.

CHANCERY DIVISION.

Boyd, C.]

[Dec. 12, 1883.]

HAMILTON PROVIDENT LOAN CO. V. CORNELL.

Action of deceit against personal representative.

G. & M. were partners, and by the terms of their dissolution G. held the lands in question as security for a lien of \$525. He with others entered into a scheme to defraud any company who would lend \$1125 on the security of the land, by getting a deed (shewing the consideration money at \$2250) executed by G. to C. and taking a receipt from G. for \$1125 in part payment. The receipt was drawn up by M. but no evidence was given to shew that G. knew of M.'s fraudulent scheme, and the deed as executed was left in G.'s solicitor's hands as an *escrow* awaiting the payment of the \$525. G. then died, plaintiffs becoming aware of his death a few days afterwards. Subsequently to their becoming aware of his death, on the recommendation of their own valuator, they lent \$1125 on the property, (the actual value of which was perhaps \$250). The receipt being sent to the plaintiffs' solicitors about the time the advance was made, S., who was G.'s administrator, knew nothing of the receipt or of the facts, except that he had a lien for the \$525. The \$525 was paid out of the proceeds of the loan.

Held, that an action of deceit would not lie against G.'s personal representative whose assets had not been increased by the fraud, as

the receipt or representation had not been acted upon until after the plaintiffs had knowledge of G.'s death.

Idington, Q. C., for administrator.

Muir, for plaintiffs.

Boyd, C.]

[November 21.]

MCKAY V. HOWARD.

*Short form mortgage — Added provisions—
construction R. S. O. c. 104.*

This was an action for wrongful distress under the following circumstances. A mortgage was made by the plaintiff to one Taylor to secure \$3,600 and interest. It was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause was printed in its usual place, viz., after the covenants. The defendant to whom this mortgage was assigned, when an instalment of interest fell due, distrained for it. The plaintiff, to prevent their goods being taken away, paid the interest to the bailiff under protest, and then brought this action.

Held, that the plaintiff was entitled to judgment for a return of the amount levied by distress and paid under protest, with interest and costs, for the earlier provision of the mortgage controlled the subsequent ones, both because first in the deed, and because it was in writing, whereas the others were the usual printed provisions, for the words superadded in writing were entitled to have a greater effect attributed to them than the printed.

Principle of construction laid down in *Robertson v. French*, 4 East, 136, and *Gunn v. Tyrie*, 4 B. & S. 713 followed.

W. Cassels, Q. C., and Gregory Cox for the plaintiffs.

John McKeown for the defendant.

PRACTICE CASES.

Proudfoot, J.]

[Nov. 28.

WEBSTER V. LEYS.

Married women—Next friend—Rules 97 and 494, O. J. A.

Where a decree was made in June, 1881, two months before the O. J. A. came into force, and an order was made on the 29th October, 1883, staying proceedings until a new next friend was appointed to the married women plaintiffs, who sue in respect of their separate estate. *Held*, that the order was right, for although Rule 97, O. J. A. says that married women may sue without a next friend in regard to their separate estate, yet R. 494, O. J. A., in effect says they shall not do so where a decree has been obtained before the O. J. A. came into force.

Black for the plaintiffs.*Kingsford* for the defendant Leys.

Divl. Ct. Chy. Div.]

[Dec. 13.

WILLS V. CARRALL.

Jurisdiction of Master in Chambers—Judgment—Absconding Debtors' Act.

The MASTER IN CHAMBERS made an order under R. S. O. c. 68, sec. 9, referring it to the County Court Judge to ascertain the amount due by an absconding debtor and judgment was entered pursuant thereto; another creditor then obtained an order from the master setting aside the judgment and allowing him in to defend.

Held, on appeal, that the MASTER IN CHAMBERS has no jurisdiction to set aside such a judgment.

On appeal the Divisional Court upheld the order of PROUDFOOT, J., but the relief sought for was granted on terms.

W. Cassels, Q.C., and Holman for the appeal.
Aylesworth, contra.

The Master in Chambers.]

[Nov. 30.

KELEBER V. MCGIBBON.

Entry of Judgment—interest—Rules 326 & 351 O. J. A.

In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pro-

nouncing the judgment, not from the day of the formal entry thereof.

Rules 326 & 351 O. J. A. are inconsistent. The "day in which judgment is pronounced" referred to in Rule 326, is "the time when judgment was entered up," referred to in Rule 351.

Ogden, for the plaintiff.*Clement*, for the defendant.

Wilson, C. J.]

[Sept. 20.

GRANT V. GRANT.

Sheriff's charges on execution—Rent—Possession—Money.

An application by the plaintiffs for the revision of a taxation by a local master. Writs of execution were placed in the sheriff's hands; and he levied on the 12th of February, 1883; the goods, with the assent of the debtor, were retained in Belleville, and in Madoc, on the premises in question, but the keys of both premises were handed to and retained by the sheriff who sold the goods on the 9th of March, 1883.

The following charges were taxed to the sheriff by the local master at Belleville:

1. Rent paid landlord of the execution debtor for premises in Belleville, due 1st March, 1883, \$250: removal of goods \$10\$260 00
2. Taking stock at Belleville two persons at \$4 each per day for ten days, \$80, and \$20 allowed at..... 60 00
3. Possession money at Belleville, 26 days at \$2 per day..... 32 00
4. Taking stock at Madoc allowed at... 8 00
4. Possession money at Madoc, 29 days \$58 and \$6..... 64 00

On appeal, WILSON, C. J., disposed of the items as follows:

No. 1 disallowed as well because the goods could have been removed before the rent became due, as because when seized they were held under the execution and in the custody of the law, and there was nothing in the lease which entitled the landlord to precipitate the payment of the rent by reason of the delivery of the execution to the sheriff.

Nos. 2 and 4 disallowed.

These items are not allowable by the tariff and by R. S. O., c. 66, sec. 51, the taxing officers can allow only such items as are correct and legal.

Prac. Cases.]

NOTES OF CANADIAN CASES.

[Prac. Cases.]

The tariff reads—"Schedule of goods taken in execution, including copy to defendant, if not exceeding five folios \$1, and for each folio above five, ten cents"; this is for the mere writing of the schedule and not a charge as in this case for the measuring, classifying and valuing of goods which requires skilled labour.

The words in section 51—"Strike out all charges for services which, in his opinion are not necessary to be performed," do not authorize the allowance of charges not expressly authorized by the tariff.

Nos. 3 and 5 referred back to the taxing officer to obtain further information and evidence if necessary, and to be allowed only if *really and necessarily paid*.

The sheriff charged poundage upon each of the seven writs, though all were issued by the same solicitor and were delivered at the same time to the sheriff who made one levy.

This charge was allowed.

Held, that this motion was properly made under R. S. O., c. 66, sec. 52, and that the plaintiffs were not barred for not following the directions of Rule 447, O. J. A., as that rule applies only to taxations before the taxing officers at Toronto, appointed under Rule 438 O. J. A., and not to local officers.

Clement, for the plaintiffs.

Aylesworth, for the defendants.

Order accordingly.

The Master in Chambers.]

[Nov. 29.]

MCLAREN v. STEPHEN.

Action upon appeal bond—staying proceedings.

An action against the sureties upon a bond given by the defendants in the action of McLaren v. Canada Central Ry. Co., upon the

appeal of the defendants to the Court of Appeal in that cause. The defendants in McLaren v. Canada Central were now appealing from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution has been stayed in consequence.

Held, that proceedings must also be stayed in this action.

Clement, for the plaintiff.

Holman, for the defendants.

Proudfoot, J.]

[Nov. 20.]

WILSON v. BEATTY.

Money in Court—Security—Payment out.

On the 16th Nov., 1881, an order was made directing D. to pay a certain sum of money into Court. D. appealed from this order to the Court of Appeal, and for the purpose of staying execution, instead of giving security, as required by R. S. O. c. 38, sec. 27, ss. 4, he paid this sum into Court, being authorized so to do by an order in Chambers. On the 27th October, 1883, the Court of Appeal reversed the order of 16th Nov., 1881. The respondents then gave notice of appeal to the Supreme Court of Canada.

Held, that the money paid in by D. must be taken to have been so paid in in lieu of the bond required by the statute; when the decision in appeal was given in D.'s favour, the money had served the purpose for which it was paid, and ought to be repaid.

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